Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1996

DUANE COLBERT EDWARDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there exists in the Eighth Amendment of the United States Constitution's prohibition against *cruel and unusual punishment* a proportionality standard that prohibits a 100 to 1 punishment of the same criminal conduct that targets African Americans' use and sale of "crack" rather than powder cocaine?

2. Whether Congress disproportioned punishment of African Americans for the same criminal conduct committed by others violates the Due Process Clause of the Fifth Amendment of the United States Constitution?

3. Whether when Congress passed a law that specifically targets African Americans, the socially disadvantaged and the poor and punishes them 100 to 1 times more harshly for the essentially same crime as that committed by the rich and more well to do, Congress violated the United States Constitution's prohibition against Bills of Attainder?

4. Whether the Rule of Lenity should apply to "crack" cocaine in the facts of the instant case?

5. Whether the federal government should be involved in governing essentially local matters?

6. Whether the legislative branch of government can give the executive branch of government the authority that essentially usurps the judiciary's sentencing authority?

7. Whether the United States Criminal Code provisions on crack cocaine violates various international treaties and therefore Article VI of the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Duane Colbert Edwards, respectfully prays that a *writ of certiorari* be issued to review the order and judgment entered in this case on December 20, 1996 by the United States Court of Appeals for the District of Columbia Circuit Court in this case.

OPINION BELOW

The opinion of the court of appeal is reported at 98 F3d 1364 (1996).

JURISDICTION

The judgment of the court of appeals, after *en banc* rehearing was denied, was entered on December 20, 1996. The jurisdiction of this Court is invoked under 28 U.S.C sec. 1254(1).

STATUTES INVOLVED

Sections 841(a)(1), 841(b)(1)(A)(iii) and 841(b)(1)(c) of Title 21 of the United States Code are set forth in the appendix to this petition.

STATEMENT OF THE CASE

By a seven-count indictment filed in the United States District Court for the District of Columbia on July

13, 1995, Petitioner Duane Colbert Edwards was charged in counts six (6) and seven (7). Count six (6) charged Petitioner with unlawful distribution of fifty (50) grams or more of cocaine base in violation of 21 U.S.C. secs. 841 (a)(1) and 841 (b)(1)(A)(iii) and 18 U.S.C. sec. 2. Count seven (7) again charged the Petitioner with unlawful distribution of fifty (50) grams or more of cocaine base in violation of 21 U.S.C. secs. 841 (a)(1) and 841 (b)(1)(iii) and 18 U.S.C. sec. 2. On July 21, 1995 Petitioner pled guilty to one (1) count of unlawful distribution of fifty (50) grams or more of cocaine base (count six (6) of the indictment) pursuant to a written plea agreement with the Office of the United States Attorney.

Petitioner cooperated with law enforcement in every conceivable way, hoping to receive a downward departure from the Federal Sentencing Guidelines as did his two (2) co-defendants. Because Edwards was not involved in the drug culture as were his two (2) co-defendants, he received the minimum sentence of ten (10) years. Both co-defendants received lesser sentences in part because of their cooperation.

Duane Colbert Edwards, a Gulf War decorated veteran, had no prior criminal history. He was not a drug dealer or a drug user. Petitioner who joined the United States Army after graduating from Suitland (Maryland) High School served in Kuwait and Iraq under hostile fire. For his heroic military service, Edwards received the Bronze Star, Certificate of Achievement, Army Achievement Medal, Southwest Asia Medal, Certificate of Merit for Safety, Kuwait Liberation Medal, Army Commendation Medal, Good Conduct Medal, National Defense Medal, Expert Marksman Badge, and Overseas Service

Bar (4 clusters). Had Edwards dropped out of high school and become a "crack" head or drug dealer and not gone to serve his country, he most likely would have had some valuable information to give law enforcement and instead of rotting for ten years in a federal prison, he would have possibly been on probation.

Petitioner went with a female co-defendant (Vonda Dortch), a habitual drug dealer, to protect her from a person she sold drugs to, and of whom she was afraid. The person who she had on an earlier occasion sold a "burn bag" (baking powder) turned out to be an undercover U.S. Park Policeman. Petitioner never received one penny or touched one gram of cocaine. He simply went along for the ride. He was her bodyguard/chauffeur.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment, Eighth Amendment, Ninth Amendment, Article III, Article VI, and Article X are all involved in this case.

REASONS FOR GRANTING WRIT

I. Equal Protection

The Fifth Amendment to the United States Constitution provides that no person shall be treated unfairly and arbitrarily. If *Due Process* means anything, it should mean that every person is entitled to a fair hearing in a fair forum to answer to fair laws.

African Americans historically have been victims of the American Criminal Justice system. Currently there exists no other place in American Jurisprudence that there is a perception among African Americans that there is no more unequal treatment by the Criminal Justice system than in the *crack v. powder* cocaine racially biased federal sentencing provisions. A review of various Circuits indicate that all Circuits agree that the disparity between *powder* and *crack* are not a violation of the various Equal Protection arguments that have been made.[1] Implicit in most of the holdings is the notion that "crack" cocaine is more potent, addictive and dangerous than powder cocaine. This is myth, not scientific fact. The D.C. Circuit and the Ninth Circuit seem to concede that there is no difference in potency, addictiveness or dangerousness between crack and powder cocaine. They do not however state how Congress can justify a 100 to 1 ratio in punishment of offenders for essentially the same crime.

The Ninth Circuit in *United States v. Jackson,* 84 F3d 1154 (9th Cir. 1996) makes the concession stating that crack and powder are indistinguishable as a "matter of chemistry" but not "legislatively". (What does that mean? (rhetorical))

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[1] See *United States v. Coleman,* 24 F3d 37 (9th Cir 1994); *United States v. Alton, et al.,* 60 F3d 1065 (3rd Cir 1995); *United States v. Butler,* 102 F3d 1191 (11th Cir 1997); *United States v. Wilson,* 1997 WI 30975 (5th Cir (LA) Decided Jan. 28, 1997); *United States v. Then,* F3d 464 (2nd Cir 1995); *United States v. Fisher, et al.,* 58 F3d 96 (4th Cir 1995); and *United States v. Jones, et al.,* 18 F3d 1145 (4th Cir 1994).

II. Bill of Attainder

Can Congress pass a constitutional law that targets poor people? Can Congress pass a constitutional law that targets African Americans? Can Congress pass a law that targets young poor African American urban males? What is the difference in smoking cocaine in a "crack" pipe rather than a "free base" pipe? Free basing powder cocaine is more addictive, potent, dangerous than crack, yet crack is punishable in a 100 to 1 different manner.

III. International Law Implications

Article III, Section 2 Clause 2 of the United States Constitution states in part that the Supreme Court has original jurisdiction over cases involving "Ambassadors, other public Ministers and Consuls".

In 1994, the United States ratified *The International Convention on the Elimination of All Forms of Racial Discrimination* (hereafter Race Convention) 660 UNTS195, 5ILM352/60AJIL650 (1965)

Article 1 of the Race Convention states:

> In the Convention, the term racial discrimination shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing or human freedoms in the political, economic, social, cultural or any other field of public life.

Article 2, Section (c) states:

> Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

The United States has undertaken a specific obligation to conform to the provisions of this Race Convention. Article VI of the United States Constitution recognizes that the Treaty obligations of the United States becomes the substantive law of the land.

The Race Convention enunciates an effects test to determine whether a particular law is violative of the Convention. We respectfully suggest that the Framers of the Constitution intended to confer original jurisdiction in the Supreme Court over treaties' effect on federal laws. The effect of federal crack laws and the application of the Federal Sentencing Guidelines have an overwhelming disparate impact on African Americans. Treatment of minorities by the United States who preach Human Rights around the world are affected by the crack cocaine law of this country. The Federal Sentencing Commission, most major newspapers, most sitting United States District Court Judges and most African Americans know that crack laws discriminate against African Americans.

Intelligent national debate, the Federal Sentencing Commission, the American Medical Association, The New York Times, The Washington Post, numerous United States Court Judges including the one who sentenced Petitioner and most African American National Organizations – including the National Bar Association – concur

that the Draconian federal sentencing guidelines that apply to 88.3% of all those sentenced for crack being African American is unfair and we believe violate the *Constitution of the United States* and *The International Convention on the Elimination of All Forms of Racial Discrimination.*

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A
Opinion of the United States Court of Appeals
UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 13, 1996 Decided October 29, 1996

No. 95-3165

UNITED STATES OF AMERICA,
APPELLEE

v.

DUANE COLBERT EDWARDS,
APPELLANT

No. 95-3196

UNITED STATES OF AMERICA,
APPELLEE

v.

VONDA MICHELLE DORTCH,
APPELLANT

On Appeal from the United States District Court
for the District of Columbia
(Nos.95cr00164-01 and 95cr00164-03).

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

John C. Floyd, III argued the cause for appellant Duane Colbert Edwards.

Lisa B. Wright, Assistant Federal Public Defender, argued the cause for appellant Vonda Michelle Dortch. *A.J. Kramer,* Federal Public Defender and *Santha Sonenberg and Amy Seidman,* Assistant Federal Public Defenders were on brief.

James G. Flood, Assistant United States Attorney, argued the cause for the appellee. *Eric H. Holder, Jr.,* United States Attorney, and *John R. Fisher* and *Thomas C. Black,* Assistant United States Attorneys, were on brief. *Elizabeth Trosman* entered an appearance.

Before: HENDERSON and RANDOLPH, *Circuit Judges;* and BUCKLEY, *Senior Circuit Judge.*

Opinion for the court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge:* Duane C. Edwards and Vonda M. Dortch both pleaded guilty to one count of distribution of cocaine base in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(A). In this consolidated appeal Edwards and Dortch both challenge the length of their respective sentences. Edwards challenges his sentence on the grounds that the different punishment for crimes involving cocaine base versus powder cocaine under statutory mandatory minima as well as the United States Sentencing Guidelines (guidelines) is (1) in violation of the fifth, eighth and fourteenth amendments to the United States Constitution; (2) a bill of attainder in violation of article I, section 9 of the Constitution; and (3) ambiguous so that the rule of lenity should apply to

shorten his sentence. Edwards also claims that Congress did not have the power under the Commerce Clause to enact the statute under which he was sentenced because it reaches drug activities that occur entirely intrastate. Dortch challenges her sentence on the grounds that the district court committed two errors under the guidelines in failing to grant her (1) a "minor participant" reduction and (2) a "diminished capacity" reduction. We affirm the sentences of both Edwards and Dortch.

I.

In the spring of 1995 the United States Park Police received information that Dortch was selling cocaine base in Washington D.C. In the ensuing months an undercover officer contacted Dortch several times and attempted to obtain cocaine base from her. The contacts led to a series of four drug sales. Dortch played a role in each transaction and Edwards was involved in the final transaction.

First, on April 5, 1995, Dortch agreed to arrange for the sale of 62 grams of cocaine base to the undercover officer. The next day Dortch arrived at the agreed upon location in an automobile driven by David Henderson. Dortch entered the officer's car first and asked the officer if he would give her drugs in exchange for having arranged the deal. The officer refused. Henderson then entered the car and exchanged the 62 grams of cocaine base for $1700. Dortch then left the car while Henderson remained. Henderson gave the officer his telephone number and indicated that in the future they could cut Dortch out of the deal.

Second, on April 28, 1995, Dortch sold 58.6 grams of cocaine base to the undercover officer in exchange for $1700.

Third, Dortch introduced the undercover officer to a runner for a drug dealer who later exchanged 62 grams of what turned out to be baking soda for $1800 with the understanding that $100 was to go to Dortch. When the officer contacted Dortch and told her that he had been given baking soda, Dortch promised she would give him 125 grams of cocaine base.

Fourth, Dortch agreed to arrange for a sale of cocaine base to take place on June 15, 1995. Dortch arrived in a car driven by Edwards. While Edwards waited in the car, Dortch got in the undercover officer's vehicle and sold him 126.6 grams of cocaine base for $3400. Officers arrested Dortch and Edwards after this transaction. A search of Edwards's car uncovered an additional 61.61 grams of cocaine base.

Edwards pleaded guilty to one count of distribution of cocaine base in violation of 21 U.S.C. § 841(a) in connection with the June 15th drug sale. The drugs sold to the officer and the drugs found in Edwards's car were combined to set a base offense level of 34 under the guidelines. Edwards received a three-point reduction for acceptance of responsibility for a total offense level of 31, with a range of 108-135 months' imprisonment. Edwards's offense carried a statutory mandatory minimum of 120 months. 21 U.S.C. § 841(b)(1)(A). The district court sentenced Edwards to 120 months to be followed by five years of supervised release.

Dortch pleaded guilty to one count of distribution of cocaine base and aiding and abetting in violation of 21 U.S.C. § 841(a) and 18 U.S.C. § 2 in connection with the April 6th drug sale. In setting the base offense level under the guidelines, the district court included drug amounts from the first, second and fourth transactions set out above. This resulted in a base offense level of 34. Dortch was granted a three-level reduction for acceptance of responsibility under section 3E1.1. Also, because Dortch qualified for the "safety valve" under section 5C1.2,[1] the statutory mandatory minimum was not applied and she received a further two-level reduction under section 2D1.1(b)(4) which provides a reduction for certain drug offenses if the defendant qualifies for the "safety valve." With the reductions Dortch had a total offense level of 29, with a range of 87-108 months' imprisonment.

At her sentencing hearing, Dortch argued for a further two-level "minor participant" reduction under section 3B1.2 of the guidelines. Dortch claimed she was entitled to the reduction because she was a mere go-between for drug suppliers and received only a fraction of the profit from the deals. Dortch also sought a downward departure based on "diminished capacity" under section 5K2.13 of the guidelines. To support her request,

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[1] If a defendant qualifies for the "safety valve," the district court imposes the sentence without regard to any statutory mandatory minimum. The relevant considerations are the defendant's criminal history, whether the offense involved death or injury or other violence, whether the defendant had a leadership role in the offense and the extent of the defendant's cooperation. *See* 18 U.S.C. § 3553(f)(1)-(5).

Dortch produced an evaluation prepared by a psychologist. The evaluation stated that Dortch had attempted to commit suicide in 1994 and concluded that Dortch suffered from "a personality structure which is marked by (1) extreme introversion; (2) an inability to interact and connect with people; and (3) pronounced distrust of others." Dortch App. at 23. The report also concluded that these features of her personality "contributed to her involvement in this crime." *Id.*

The district court found that Dortch was eligible for neither a "minor participant" reduction nor a "diminished capacity" departure. The court sentenced Dortch to 87 months in prison to be followed by five years of supervised release.

II.

Edwards received a ten-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A). Section 841(b)(1)(A) treats offenses involving cocaine base and offenses involving powder cocaine differently. The ten-year mandatory minimum applies if the offense involves 50 grams or more of cocaine base but, for offenses involving powder cocaine, the ten-year mandatory minimum applies only to offenses involving 5 kilograms or more. Edwards argues that the sentencing policy disproportionately harms black defendants, the predominant users of cocaine base, and therefore violates various provisions of the Constitution.

Edwards first claims that the disparate impact on black defendants violates the equal protection component of the due process clause of the fifth amendment. We

have previously rejected identical challenges. *United States v. Johnson*, 40 F.3d 436, 439-41 (D.C.Cir. 1994), *cert. denied*, 115 S. Ct. 1412 (1995); *United States v. Thompson*, 27 F.3d 671, 678 (D.C.Cir.), *cert. denied*, 115 S. Ct. 650 (1994). In *Johnson* we held that Congress had not acted with a discriminatory purpose in setting greater penalties for cocaine base crimes than for powder cocaine offenses. 40 F.3d at 440-41. We have also held that the punishment distinction between cocaine base and powder cocaine in the statute survives rational basis review. *Thompson*, 27 F.3d at 678; *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C.Cir. 1989). We therefore reject Edwards's fifth amendment challenge to the statute. Edwards also claims that the severity of the sentences for cocaine base offenses under the statute constitutes cruel and unusual punishment under the eighth amendment. We have also previously rejected eighth amendment challenges to the statute. *Thompson*, 27 F.3d at 678; *Cyrus*, 890 F.2d at 1248. Finally, Edwards claims that the statute violates the equal protection clause of the fourteenth amendment. But the fourteenth amendment does not apply to the federal government; an equal protection challenge to the statute must be raised under the fifth amendment instead. As discussed above, we have explicitly rejected a fifth amendment equal protection challenge to the statute.

Edwards also argues that the differential treatment of cocaine base and powder cocaine offenses amounts to a bill of attainder in violation of article I, section 9 of the Constitution. Edwards rests his argument on language from *United States v. Brown*, 381 U.S. 437 (1965), that bills of attainder encompass not only legislative acts that name specific persons but also legislation that applies to readily

ascertainable classes of individuals. According to Edwards, Congress had information that imposing harsher penalties for cocaine base offenses would disproportionately affect black defendants. He concludes that blacks are an "easily ascertainable class" targeted by the law and therefore the law is a bill of attainder. Edwards Opening Brief at 27. Edwards's argument fails. The vice of a bill of attainder is that it impermissibly singles out a person or class of persons for punishment without judicial determination of guilt. *See Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977); *Brown*, 381 U.S. at 450. The statute under which Edwards was sentenced, however, does not single out any particular class but rather by its plain terms applies to "any person." 21 U.S.C. § 841(b). Neither does the statute impose a penalty without judicial determination of guilt. The statute is one of general applicability providing for post-conviction punishment.

Edwards next argues that the terms "cocaine base" and "cocaine" as used in 21 U.S.C. § 841(b)(1)(A)(iii) are ambiguous and therefore the rule of lenity requires that the less severe penalty be applied. In Edwards's plea agreement he agreed that his offense involved 170 grams of cocaine base. Treated as "cocaine base" this amount of drugs yields a ten-year mandatory minimum sentence under the statute. If treated as "cocaine," there would be no mandatory minimum under the statute. Edwards argues that cocaine base and powder cocaine are pharmacologically indistinguishable; therefore, the term "cocaine" in the statute, which covers offenses involving powder cocaine, should apply equally to cocaine base. Edwards concludes that because both terms cover the

substance involved in his offense, the rule of lenity requires the application of the less severe penalty.

The rule of lenity is not applied unless there is a "grievous ambiguity or uncertainty." *Chapman v. United States*, 500 U.S. 453 (1991) (quoting *Huddleston v. United States*, 415 U.S. 814, 831 (1974)). There is no "grievous" ambiguity in the terms "cocaine base" and "cocaine." We find ample support to conclude that Congress intended the stiffer penalties associated with "cocaine base" to apply to offenses involving crack cocaine and the less severe penalties to apply to offenses involving powder cocaine. Edwards does not dispute the point. Indeed, his equal protection argument is premised on the claim that a discriminatory purpose can be inferred from the fact that Congress treated cocaine base and powder cocaine differently. Likewise our decisions rejecting constitutional challenges to the statute assume that the statutory scheme plainly distinguishes between cocaine base and powder cocaine. *See, e.g., Johnson*, 40 F.3d at 438 ("These cases involve a constitutional challenge to the Anti-Drug Abuse Act of 1986 . . . which punishes crimes involving 'crack' cocaine more severely than those involving an equivalent amount of powder cocaine."). Thus Edwards's rule of lenity claim appears to be not that congressional intent to treat the substances differently cannot be ascertained but rather that the statute fails to unambiguously give effect to that intent inasmuch as the substances are pharmacologically indistinguishable. Whatever the pharmacological similarities, however, we find no ambiguity in the terms "cocaine base" and "cocaine" and join the other circuits that have rejected rule of lenity challenges to the statute. *See United States v. Jackson*, 84 F.3d 1154,

1159-61 (9th Cir. 1996); *United States v. Booker*, 70 F.3d 488, 489-94 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 1334 (1996); *United States v. Jackson*, 64 F.3d 1213, 1219-20 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 966 (1996); *United States v. Fisher*, 58 F.3d 96, 98-99 (4th Cir.), *cert. denied*, 116 S. Ct. 329 (1995).

Finally, Edwards claims that Congress acted beyond its powers under the Commerce Clause in enacting section 401(a)(1) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841(a)(1) (Drug Act), because it regulates intrastate drug activities that do not substantially affect interstate commerce. Edwards relies on the Supreme Court's decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), which struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (Gun Act), on the ground that Congress had exceeded its power under the Commerce Clause in enacting the statute. We have previously denied a Commerce Clause challenge to the Drug Act. *United States v. Davis*, 561 F.2d 1014, 1018-20 (D.C.Cir.), *cert. denied*, 434 U.S. 929 (1977). The Court's decision in *Lopez* leaves *Davis* intact. In *Lopez* the Court held that the conduct prohibited by the Gun Act did not have a substantial effect on interstate commerce. 115 S. Ct. at 1630-31. By contrast, the Drug Act includes specific findings that intrastate drug activity has a substantial effect on interstate drug activities and that effective control of drug activities occurring intrastate requires both interstate and intrastate regulation. 21 U.S.C. § 801. We follow the other circuits that have upheld the Drug Act against a post-*Lopez* Commerce

Clause challenge.[2] *See, e.g., United States v. Wacker*, 72 F.3d 1453, 1474-75 (10th Cir. 1995); *United States v. Leshuk*, 65 F.3d 1105, 1111-12 (4th Cir. 1995).

III.

Dortch argues that the district judge erred in denying her a two-level "minor participant" reduction under section 3B1.2 of the guidelines.[3] Dortch first claims that the district court applied the incorrect legal standard in denying the minor participant reduction. This claim raises a question of law that we review *de novo*. *See United States v. Kim*, 23 F.3d 513, 516-17 (D.C. Cir. 1994). We have previously stated the legal standard applicable to the minor participant reduction as follows:

> Before it may find that a defendant was a minor participant in the offense . . . the evidence available to the court at sentencing must, at a minimum, show (i) that the "relevant conduct" for

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[2] Even if we were to find that Congress exceeded its power under the Commerce Clause in enacting the Drug Act, this would not affect the outcome here. These drug transactions took place in the District of Columbia. Assuming, *arguendo*, that there are limitations on Congress' power to regulate local drug activities elsewhere in the country, Congress has the power to police drug activity in the District of Columbia under article I, section 8 of the Constitution.

[3] Section 3B1.2 provides:

> Based on the defendant's role in the offense, decrease the offense level as follows: (a) If the defendant was a minimal participant in any activity, decrease by 4 levels. (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels. In cases falling between (a) and (b) decrease by 3 levels.

> which the defendant would, within the meaning of section 1B1.3(a)(1), be otherwise accountable involved more than one participant . . . and (ii) that the defendant's culpability for such conduct was relatively minor compared to that of the other participant(s).

United States v. Caballero, 936 F.2d 1292, 1299 (D.C. Cir. 1991). It is undisputed that there were multiple participants involved in the "relevant conduct" for which Dortch is accountable. Dortch's claim is that the district court denied the minor participant reduction without making the necessary findings of relative culpability required by the second part of the legal standard set forth above. In denying the minor participant reduction, the district judge stated at the sentencing hearing:

> Now, I want you to know that based upon my review of the records, I do believe you were more than a facilitator and that you voluntarily and knowingly did what brings you before the court.

Dortch Sent. Tr. at 29.

Dortch argues that this statement shows that the district judge equated Dortch's status as "more than a facilitator" coupled with the fact that she acted "voluntarily and knowingly" with ineligibility for the minor participant reduction. Dortch argues further that the sentencing judge erroneously imposed a per se rule that a defendant who is "more than a facilitator" and acts "knowingly and voluntarily" can never qualify for the minor participant reduction even if that person's culpability is relatively minor compared to that of other participants. The adoption of such a per se rule would be

contrary to our holding in *Caballero* where we held that the district court erred in granting the two-level minor participant reduction based on the defendant's generic status as a "courier." 936 F.2d at 1299-1300. The *Caballero* holding, however, does not mean that we will reverse every time the district court fails to use the magic words "relative culpability" or does not make explicit findings of relative culpability on the record. The import of *Caballero* is simply that the district court must assess the defendant's role in the specific criminal conduct and not gauge his culpability generically. We believe that the district judge did just that in this case.[4]

In deciding the issue we do not view the single statement in which the judge explained her denial of the reduction in isolation. Instead, we look to the entire circumstances of the sentencing hearing as well as the record. In the first place, Dortch's attorney argued for the minor participant reduction by telling the court: "Essentially, Ms. Dortch was what I believe the law would classify her to be a facilitator, and that's why we are asking the Court to adjust her role in the offense to that of a minor participant." Dortch Sent. Tr. at 8. It was perfectly reasonable for the district court to deny Dortch the reduction in the same terms her attorney used. Moreover,

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[4] In accord with *Caballero*, we reaffirm the impropriety of a per se rule in this context. Thus it would be incorrect to say that as a matter of law one who is "more than a facilitator" could never qualify for the minor participant reduction. However, we suspect that it is a rare case in which a defendant can be accurately described as "more than a facilitator" and yet also be relatively less culpable than other participants so as to qualify for the minor participant reduction.

the details of Dortch's role in the offense were rehearsed at the hearing and the judge concluded that Dortch was more than a facilitator "based upon [her] review of the records." Dortch Sent. Tr. at 29. We find that this shows the district judge properly examined Dortch's role in the charged offense and not the role of defendants who are "more than facilitators" generally. In contrast, the district judge in *Caballero* stated that the defendant was entitled to the reduction because "people like this defendant . . . really are just couriers and do not have a major responsibility for the drug plague that plagues this country." 936 F.2d at 1299.

Dortch argues in the alternative that even if the district judge did apply the correct legal standard, she nevertheless erred in finding that the facts precluded the minor participant reduction. In other words, Dortch contends that as a matter of fact her "culpability . . . was relatively minor compared to that of other participant(s)." *Caballero,* 936 F.2d at 1299. We review the district court's factual findings under the clearly erroneous standard and we accord "due deference to the district court's application of the guidelines to the facts." *Kim,* 23 F.3d at 517 (quoting 18 U.S.C. § 3742(e)(4)); *see also Koon v. United States,* 116 S. Ct. 2035, 2046-47 (1996); *United States v. Graham,* 83 F.3d 1466, 1481-82 (D.C.Cir. 1996) (applying these standards of review in affirming denial of minor participant reduction).

Dortch claims she was relatively less culpable than Edwards and Henderson because they supplied the drugs while she was only the go-between who arranged the deals. She also claims that she realized a relatively small profit compared to Henderson and Edwards. We disagree

with Dortch's assessment of her relative culpability. Dortch played an instrumental role in each of the drug transactions. She did more than simply exchange names and telephone numbers. The record shows that at least once Dortch actually handled the drugs and exchanged them for money. On another occasion Dortch requested payment in drugs for her services in arranging the deal. On the facts of the case, the district court did not err in denying the minor participant reduction.

Dortch also argues that the district court erred in denying a "diminished capacity" downward departure under section 5K2.13 of the guidelines.[5] The district court interpreted "diminished capacity" under the guidelines to refer to diminished *intellectual* capacity. Dortch Sent. Tr. at 14. Dortch contends that diminished capacity refers not only to intellectual capacity but also encompasses psychological or behavioral disorders. If such a psychological or behavioral disorder serves as the basis for the departure, however, there must be an accompanying inability to reason. *See United States v. Goossens*, 84 F.3d 697, 701 (4th Cir. 1996); *United States v. Cantu*, 12 F.3d 1506, 1512-13 (9th Cir. 1993). The district judge below

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[5] Section 5K2.13 provides:

> If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

simply stated that there could be no reduction absent diminished "intellectual capacity." "Intellectual capacity" means one's ability to reason or make judgments. The district judge's statement, "I don't know why we would suggest that because she may have psychological problems that she has intellectual capacity problems," Dortch Sent. Tr. at 15, is not to the contrary. We take this statement to mean not that psychological or behavioral disorders can never support a diminished capacity reduction but only that Dortch failed to establish that any psychological problems she may have had diminished her ability to reason. The record supports the district court's finding. Dortch produced only a report from a psychologist opining that she suffered from "extreme introversion, . . . an inability to interact or connect with people and . . . pronounced distrust of others." Dortch App. at 23. These traits do not entitle Dortch to a diminished capacity departure. Moreover, there was nothing in the report to suggest that her personality problems contributed to the crime by diminishing her ability to reason.

For the foregoing reasons, the judgments of the district court are

Affirmed.

APPENDIX B
Order On Rehearing

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-3165

September Term, 1996
95cr00164-01
95cr00164-03

United States of America,

Appellee

v.

Duane Colbert Edwards,

Appellant

Consolidated with 95-3196

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges, and Buckley, Senior Circuit Judge

ORDER
(Filed Dec. 20, 1996)

Upon consideration of appellant's Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-3165 **September Term, 1996**
95cr00164-01
95cr00164-03

United States of America,

Appellee

v.

Duane Colbert Edwards,

Appellant

Consolidated with 95-3196

BEFORE: Henderson, and Randolph, Circuit Judges, and Buckley, Senior Circuit Judge

ORDER
(Filed Dec. 20, 1996)

Upon consideration of appellant's petition for rehearing filed December 10, 1996, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX C
Statute

OFFENSES AND PENALTIES

§ 841. Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily

injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861] after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be

eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivaties of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18. United States Code, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18,

United States Code, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United

States Code, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18. United States Code, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18. United States Code, or $500,000

if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of

imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 404 [21 USCS § 844] and section 3607 of title 18, United States Code.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal

property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed –

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18, United States Code;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use –

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(c) **[Caution: for effective date and savings provisions, see § 235 of Act Oct. 12, 1984, P. L. 98-473, which appears as 18 USCS § 3551 note]** A term of supervised release imposed under this section or section 418, 419, or 420 [21 USCS § 859, 860, or 861] may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the term of supervised release and the resulting new

term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose term of supervised release has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A term of supervised release provided for in this section or section 418, 419, or 420 [21 USCS § 859, 860, or 861] shall be in addition to, and not in lieu of, any other parole provided for by law.

(d) Any person who knowingly or intentionally –

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this title;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 310 [21 USCS § 830], or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with title 18, United States Code, or imprisoned not more than 10 years, or both.

(e) **Penalty.** (1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(f) In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, or importation of a listed chemical may be enjoined from engaging in any regulated transaction involving a listed chemical for not more than ten years.

(g)(1) Whoever knowingly distributes a listed chemical in violation of this title (other than in violation of a recordkeeping or reporting requirement of section 310 [21 USCS § 830]) shall be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 310 [21 USCS § 830] have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18, United States Code, or imprisoned not more than one year, or both.

APPENDIX D
Treaty

IV. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, 1966

The great theme which pervades the previsions of the U.N. Charter and other instruments, both national and international, concerned with human rights and civil liberties, is that of equality. It has slowly come to be recognized that racial discrimination and resulting conflict are a major issue in world affairs. The convention opened for signature on 7 March 1966, was adopted by the General Assembly of the United Nations on 21 December 1965. It has been signed by seventy-one States and a hundred and eight States have become parties. For the text in various languages *see U.K. Treaty Series,* Misc. No. 77, 1969, Cmnd -p 108. The individual complaints procedure order Article 14 is not yet operative.

For further reference see U.N., *Multilateral Treaties in Respect of which the Secretary-General Performs Depository Functions,* 1978, pp. 83-98; Philip Mason, *Patterns of Democracy,* 1970; Schwelb, *International and Comparative Law Quarterly,* 15, 1966; p. 996. Brownlie, Principles of Public International Law tried 1979, pp. 596-8.

The link between the issue of racial equality and decolonization is established in the resolution of the General Assembly of the United Nations (printed as an annex below) Resolutions 2106 (XX), B, associated with the adoption by the General Assembly of the Convention itself. See further Resolution 2547 (XXIV) adopted by the General Assembly on 15 December 1969.

TEXT

The States Parties to this Convention,

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in cooperation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end,

Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1940 (XVIII) solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person,

Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous and that there is no justification for racial discrimination, in theory or in practice, anywhere,

Reaffirming that discrimination, between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State,

Convinced that the existence of racial barriers is repugnant to the ideals of any human society.

Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of *apartheid*, segregation or separation,

Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between

races and to build an international community free from all forms of racial segregation and racial discrimination,

Bearing in mind the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organization in 1958, and the Convention against Discrimination in Education adopted by the United Nations Educational, Scientific and Cultural Organization in 1960,

Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end,

Have agreed as follows:

PART I

Article 1

1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of human rights and fundamental freedom in the political, economic, social, cultural or any other field of public life.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of State Parties

concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes act to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 3

State Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate

all practices of this nature in territories under their jurisdiction.

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this convention, *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;

(c) Political rights, in particular the rights to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The Right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view of combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

PART II

Article 8

1. There shall be established a Committee on the Elimination of Racial Discrimination (hereinafter referred to as the Committee) consisting of eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve

in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of this Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two-thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. *(a)* The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

(b) For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

6. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 9

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention; *(a)* within one year after the entry into force of the convention for the State concerned; and *(b)* thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.

2. The Committee shall report annually, through the Secretary-General to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from States Parties.

Article 10

1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

3. The secretariat of the Committee shall be provided by the Secretary-General of the United Nations.

4. The meetings of the Committee shall normally, be held at United Nations Headquarters.

Article 11

1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State.

3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have

been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

4. In any matter referred to it, the Committee may call upon the States Parties concerned to supply any other relevant information.

5. When any matter arising out of this article is being considered by the Committee, the States Parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration.

Article 12

1. *(a)* After the Committee has obtained and collated all the information it deems necessary, the Chairman shall appoint an *ad hoc* conciliation Commission (hereinafter referred to as the Commission) comprising five persons who may or may not be members of the Committee. The members of the Commission shall be appointed with the unanimous consent of the parties to the dispute, and its good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention.

(b) If the States Parties to the dispute fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission not agreed upon by the States Parties to the dispute shall be elected by secret ballot by a two-thirds

majority vote of the Committee from among its own members.

2. The members of the Commission shall serve in their person capacity. They shall not be nationals of the States Parties to the dispute or of a State not Party to this Convention.

3. The Commission shall elect is own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Commission.

5. The Secretariat provided in accordance with Article 10, paragraph 3, of this Convention shall also service the Commission whenever a dispute among States Parties brings the Commission into being.

6. The States Parties to the dispute shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

7. The Secretary-General shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties to the dispute in accordance with paragraph 6 of this article.

8. The information obtained and collated by the Committee shall be made available to the Commission, and the Commission may call upon the States concerned to supply any other relevant information.

Article 13

1. When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute.

2. The Chairman of the Committee shall communicate the report of the Commission to each of the States parties to the dispute. These States shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the commission.

3. After the period provided for in paragraph 2 of this article, the chairman of the Committee shall communicate the report of the Commission and the declarations of the States Parties concerned to the other States Parties to this Convention.

Article 14

1. A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. Any State Party which makes a declaration as provided for in paragraph 1 of this article may establish or

indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention and who have exhausted other available local remedies.

3. A declaration made in accordance with paragraph 1 of this article and the name of anybody established or indicated in accordance with paragraph 2 of this article shall be deposited by the State Party concerned with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General, but such a withdrawal shall not affect communications pending before the Committee.

4. A register of petitions shall be kept by the body established or indicated in accordance with paragraph 2 of this article, and certified copies of the register shall be filed annually through appropriate channels with the Secretary-General on the understanding that the contents shall not be publicly disclosed.

5. In the event of failure to obtain satisfaction from the body established or indicated in accordance with paragraph 2 of this article, the petitioner shall have the right to communicate the matters to the Committee within six months.

6. *(a)* The Committee shall confidentially bring any communication referred to it to the attention of the State Party alleged to be violating any provision of this Convention, but the identity of the individual or groups of individuals concerned shall not be revealed without his

or their express consent. The Committee shall not receive anonymous communications.

(b) Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State.

7. *(a)* The Committee shall consider communications in the light of all information made available to it by the State Party concerned and by the petitioner. The Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged.

(b) The Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

8. The Committee shall include in its annual report a summary of such communications and, where appropriate, a summary of the explanations and statements of the States Parties concerned and of its own suggestions and recommendations.

9. The Committee shall be competent to exercise the functions provided for in this Article only when at least ten States Parties to this Convention are bound by declarations in accordance with paragraph 1 of this article.

Article 15

1. Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial

Countries and Peoples, contained in General Assembly resolution 1514 (XV) of 14 December 1960, the provisions of this Convention shall in no way limit the right of petition granted to these peoples by other international instruments or by the United Nations and its specialized agencies.

2. *(a)* The Committee established under Article 8, paragraph 1, of this Convention shall receive copies of the petitions from, and submit expressions of opinion and recommendations on these petitions to the bodies of the United Nations which deal with matters directly related to the principles and objectives of this Convention in their consideration of petitions from the inhabitants of Trust and Non-Self-Governing Territories and all other territories to which General Assembly resolution 1514 (XV) applies, relating to matters covered by this Convention which are before these bodies.

(b) The Committee shall receive from the competent bodies of the United Nations copies of the reports concerning the legislative, judicial, administrative or other measures directly related to the principles and objectives of this Convention applied by the administering Powers within the Territories mentioned in sub-paragraph *(a)* of this paragraph, and shall express opinions and made recommendations to these bodies.

3. The Committee shall include in its report to the General Assembly a summary of the petitions and reports it has received from United Nations bodies, and the expressions of opinion and recommendations of the Committee relating to the said petitions and reports.

4. The Committee shall request from the Secretary-General of the United Nations all information relevant to the objectives of this Convention and available to him regarding the Territories mentioned in paragraph 2 *(a)* of this article.

Article 16

The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints is the field of discrimination laid down in the constituent instruments of, or in conventions adopted by, the United Nations and its specialized agencies, and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

PART III

Article 17

1. This Convention is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Course of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 18

1. This Convention shall be open to accession by any State referred to in Article 17, paragraph 1, of the Convention.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 19

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twenty-seventh instrument of ratification or instrument of accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twenty-seventh instrument of ratification or instrument of accession the Convention shall enter force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 20

1. The Secretary-General of the United Nations shall receive and circulate to all States which are or may become parties to this Convention reservations made by States at the time of ratification or accession. Any State which objects to the reservation shall, within a period of ninety days from the date of the said communication, notify the Secretary-General that it does not accept it.

2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification, shall take effect on the date on which it is received.

Article 21

A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

Article 22

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

Article 23

1. A request for the revision of this Convention may be made at any time by any State party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 24

The Secretary-General of the United Nations shall inform all States referred to in Article 17, paragraph 1, of this Convention of the following particulars:

(a) Signatures ratifications and accessions under Articles 17 and 18;

(b) The date of entry into force of this Convention under Article 19;

(c) Communications and declarations received under Articles 14, 20 and 23;

(d) Denunciations under Article 21.

Article 25

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States belonging to any of the categories mentioned in Article 17, paragraph 1, of the Convention.

In faith whereof the undersigned, being duly authorized thereto by their respective Governments, have signed the present Convention, opened for signature at New York, on the seventh day of March, one thousand nine hundred and sixty-six.

ANNEX

The General Assembly,

Recalling the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in its resolution 1514 (XV) of 14 December 1960.

Bearing in mind its resolution 1654 (XVI) of 27 November 1961, which established the Special Committee on the Situation with regard to the Implementation of the Declaration, on the Granting of Independence to Colonial Countries and Peoples to examine the application of the Declaration and to carry out is provisions by all means at its disposal.

Bearing in mind also the provisions of Article 15 of the International Convention on the Elimination of All Forms of Racial Discrimination contained in the annex to resolution 2106 A (XX) above,

Recalling that the General Assembly has established other bodies to receive and examine petitions from the peoples of colonial countries,

Convinced that close co-operation between the Committee on the Elimination of Racial Discrimination, established by the International Convention on the Elimination of All Forms of Racial Discrimination, and the bodies of

the United Nations charged with receiving and examining petitions from the peoples of colonial countries will facilitate the achievement of the objectives of both the Convention and the Declaration on the Granting of Independence to Colonial Countries and Peoples,

Recognizing that the elimination of racial discrimination in all its forms is vital to the achievement of fundamental human rights and to the assurance of the dignity and worth of the human person, and thus constitutes a pre-emptory obligation under the Charter of the United Nations.

1. *Calls upon* the Secretary-General to make available to the Committee on the Elimination of Racial Discrimination, periodically or at its request, all information in his possession relevant to Article 15 of the International Convention on the Elimination of All Forms of Racial Discrimination;

2. *Requests* the Special Committee on the Situation with regard to the Implementation of the Granting of Independence to Colonial Countries and Peoples, and all other bodies of the United Nations authorized to receive and examine petitions from the peoples of the colonial countries, to transmit to the Committee on the Elimination of Racial Discrimination, periodically or at its request, copies of petitions from those peoples relevant to the Convention, for the comments and recommendations of the said Committee;

3. *Requests* the bodies referred to in paragraph 2 above to include in their annual reports to the General Assembly a summary of the action taken by them under the terms of the present resolution.

SELECTED EXCERPTS FROM SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY

APPENDIX E
Federal Sentencing Excerpts

Special Report to the Congress:

Cocaine and Federal Sentencing Policy

(as directed by section 280006 of Public Law 103-322)

[SEAL]

UNITED STATES SENTENCING COMMISSION

February 1995

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EXECUTIVE SUMMARY

INTRODUCTION

In the Omnibus Violent Crime Control and Law Enforcement Act of 1994, Congress directed the United States Sentencing Commission to study federal sentencing policy as it relates to possession and distribution of all forms of cocaine. Specifically, Congress directed the

Sentencing Commission to report on the current federal structure of differing penalties for powder cocaine and crack cocaine offenses and to provide recommendations for retention or modification of these differences.

The Commission balanced conflicting policy goals in developing its recommendations concerning powder and crack cocaine sentencing. In reviewing the evidence, the Commission found that, under some criteria, crack offenses deserve lengthier punishment than powder offenses, but on other criteria differential treatment could not be justified. The recommendations reflect out weighing of these competing considerations to yield a cautious and balanced judgment of the best federal sentencing policy for cocaine offenders. The major conclusions can be summarized as follows:

1. Drugs are a serious problem, and crack and powder cocaine are dangerous drugs.

2. While some aspects of crack cocaine use and distribution suggest that a higher penalty for crack offenses compared to powder cocaine offenses is appropriate, the present 100-to-1 quantity ratio is too great.

3. Among other problems, the 100-to-1 quantity ratio creates anomalous results by potentially punishing low-level (retail) crack dealers far more severely than their high-level (wholesale) suppliers of the powder cocaine that served as the product for conversion into crack.

4. Congress established the Sentencing Commission to develop sentencing policies and practices that address congressional concerns, to evaluate the effectiveness of these policies, and to refine the guidelines and recommend legislation as needed.

5. The sentencing guidelines provide a more precise mechanism than the mandatory minimum penalty statutes for tailoring appropriate sentences to individual defendants.

6. The quantity and form of cocaine involved in an offense are two factors for determining appropriate punishment, but in a given case other characteristics of the offense and the offender can be equally or more important. The guidelines should be refined to address better those harms that prompted Congress to establish the 100-to-1 quantity ratio.

The Commission's recommendations are twofold:

1. That the Commission establish methods within the guidelines structure to deal with the crimes of possession and distribution of both crack cocaine and powder cocaine; such Commission action to take place by the normal 1995-1996 amendment cycle.

2. That, in light of the Commission's guideline amendments, Congress revisit the 100-to-1 quantity ratio as well as the penalty structure for simple possession that provides a mandatory five-year penalty for simple possession of crack cocaine but a statutory maximum penalty of one year for simple possession of any other drug.

BACKGROUND

Examination of these issues necessarily requires an understanding of the role of the Sentencing Commission in the context of federal sentencing policy, mandatory minimum penalties for drug offenses generally, and cocaine penalties specifically. In 1984, after more than two decades of debate and study, a strongly bipartisan Congress enacted the most far-reaching reform of federal

sentencing in this nation's history, the Sentencing Reform Act. The central features of that historic legislation included a comprehensive statement of federal sentencing laws; appellate review of sentences; abolition of parole; and the creation of the United States Sentencing Commission to develop a detailed system of guidelines that would structure and direct the previously unfettered sentencing discretion of federal district court judges.

Congress established the Sentencing Commission as an independent, permanent agency in the judicial branch of government. Composed of seven voting and two non-voting, *ex officio* members, the Sentencing Commission's mandate was to develop guidelines for federal criminal offenses that would bring greater certainty, honesty, and uniformity to sentencing, ensure just punishment, and promote crime control. While the legislative history describes a number of motivating concerns in establishing a guideline system, none was more important to Congress than the reduction of unwarranted sentence disparity.

The initial set of guidelines became law in November 1987. In January 1989, the Supreme Court upheld the constitutionality of the Sentencing Commission and the guidelines in *Mistretta v. United States*, 488 U.S. 361 (1989), and full nationwide implementation of the federal sentencing guidelines followed. The Sentencing Commission, consistent with its mandate, continues to promulgate guidelines and amendments that reflect changes in statutory offenses and their penalties, directives from Congress, empirical research, emerging case law, the changing nature of crime, and developments in knowledge about effective crime control.

At the same time that the Sentencing Commission was developing, promulgating, and amending guidelines, Congress enacted a number of mandatory minimum penalty statutes, largely for drug and weapons offenses and for recidivist offenders. Among the mandatory minimum penalties were those enacted in 1986 and 1988 for sentencing federal cocaine offenses. In establishing these mandatory minimum penalties, Congress differentiated between two forms of cocaine – powder and crack (the commonly consumed form of cocaine base) – and singled out crack cocaine for much harsher punishment. Congress implemented this differential by requiring substantially lesser quantities of cocaine base than powder cocaine to trigger the five- and ten-year mandatory minimum penalties applicable to both forms of cocaine.

As a result of Congress's legislative action, the federal criminal code today provides the following penalties for first-offense cocaine trafficking:

5 grams or more of crack cocaine
or = five-year mandatory minimum penalty
500 grams or more of powder cocaine

50 grams or more of crack cocaine
or = ten-year mandatory minimum penalty
5,000 grams or more of powder cocaine

This statutory 100-to-1 quantity ratio of powder cocaine to crack cocaine (*i.e.*, it takes 100 times as much

powder cocaine compared to crack to trigger the mandatory minimum penalties) in turn is incorporated into the federal sentencing guidelines, thereby maintaining a similar quantity ratio for offenders involved with drug quantities above and below the specified mandatory minimum penalty amounts. These statutory/guideline differentiations mean that, for any given quantity of cocaine, sentences for offenses involving crack cocaine are much more severe than those for like offenses involving powder cocaine.

In the Anti-Drug Abuse Act of 1988, Congress further distinguished crack cocaine from both powder cocaine and other drugs by creating a mandatory minimum penalty for simple possession of crack cocaine, the only such federal penalty for a first offense of simple possession of a controlled substance. Under this law, possession of more than five grams of crack cocaine triggers a *minimum* sentence of five years in prison; simple possession of any quantity of any other substance by a first-time offender – including powder cocaine – is a misdemeanor offense punishable by a *maximum* of one year in prison.

In 1990, Congress directed the Sentencing Commission to respond to a series of questions concerning the compatibility between sentencing guidelines and mandatory minimum penalties, the effect of mandatory minimums, and options for Congress to direct sentencing policy through mechanisms other than mandatory minimums.[1] The Sentencing Commission's response concluded that the most efficient and effective way for

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[1] *See* Pub. L. No. 101-647, 104 Stat. 4846 (1990).

Congress to direct sentencing policy is through the established process of sentencing guidelines, rather than through mandatory minimum penalties.[2] The Commission reasoned that Congress could thereby achieve the objectives of mandatory minimum penalties (*i.e.*, certain, lengthy sentences for specific categories of offenses and offenders) without compromising other important legislative goals.[3]

Within this context, the Sentencing Commission makes the following general observations based on its review of available relevant data:

1) Congress addressed an indisputably deep public concern regarding the societal impact of cocaine, particularly in its derivative form of crack, when it established mandatory minimum penalties for trafficking and possession of cocaine in ~~1986~~ and 1988. Cocaine, including its relatively new form of crack, was viewed as dramatically increasing the national crime rate, significantly threatening public health, leading to an increasingly violent drug trade, and spreading in an "epidemic" manner. These concerns remain very much a part of the public debate today.

2) The general observations regarding the incompatibility of mandatory minimum penalties and sentencing guidelines made by the Sentencing Commission in its August 1991 report to Congress

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[2] *See* U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Aug. 1991).

[3] The Commission's 1991 report did not specifically focus on the mandatory minimum penalties applicable to sentencing for federal cocaine offenses.

remain valid when applied to the specific issue of mandatory minimum penalties for cocaine offenses.[4]

3) Of particular note, when Congress established the mandatory minimum penalties for most drug offenses in 1986 and 1988, the federal sentencing guidelines had not been fully implemented. Consequently, when Congress established the 100-to-1 quantity ratio in 1986, no vehicle other than mandatory minimums existed to ensure that specified types of offenses and offenders received certain punishment. Since nationwide implementation of the guidelines in 1989, Congress has had the ability to set national sentencing policy through the more sophisticated guidelines system.

4) Despite the unprecedented level of public attention focused on crack cocaine, a substantial gap continues to exist between the anecdotal experiences that often prompt a call for action and empirical knowledge upon which to base sound policy. Three factors account for this gap. First, although powder cocaine and crack cocaine are two forms of the same drug that are consumed in different ways, much of the data collected on cocaine and its effects does not distinguish between its different forms. Second, because drug users constitute a primary source of information, conclusions are difficult to draw with any degree of confidence. Third, as crack cocaine has only been on the market a relatively short period of time, research that might more fully address outstanding concerns has not yet occurred. Accordingly, given the current information gap, policymakers must draw conclusions cautiously.

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[4] U.S. Sentencing Commission, *supra* note 2 at ii-iv.

FINDINGS

The extant research and empirical data support the following findings:

- **Pharmacology** (*see* Chapter 2): Cocaine is a naturally occurring substance, derived from the leaves of the erythroxylon plant, that has two prominent actions: 1) it is a potent anesthetic; and 2) it is a powerful stimulant.
- **Forms of Cocaine** (*see* Chapter 2): Powder cocaine and crack cocaine are two forms of the same drug, containing the same active ingredient – the cocaine alkaloid. Powder cocaine (cocaine hydrochloride), the most commonly used form of cocaine, is produced by reacting coca paste, derived from leaves of the coca plant, with hydrochloric acid. Crack cocaine, in turn, is made from powder cocaine in a simple process that requires baking soda, water, and a stove or microwave. Approximately ten percent of the drug is lost during the conversion process; hence, one gram of powder cocaine will yield .89 grams of crack cocaine. Less frequently consumed forms of cocaine include coca leaves, coca paste, and freebase cocaine.
- **Routes of Administration** (*see* Chapter 2): Cocaine in any form – paste, powder, freebase, or crack – produces the same physiological and psychotropic effects. The onset, intensity, and duration of effects, however, differ according to the route of the drug's administration which, in turn, is dictated in part by the form of cocaine. Powder cocaine can be snorted, injected, or ingested; crack cocaine can only be smoked.
- **Time to Maximum Effect** (*see* Chapter 2): Reactions to cocaine use differ; the faster cocaine

reaches the brain, the greater the intensity of the psychotropic effects. Research shows that maximum psychotropic effects can be realized as quickly as one minute after smoking crack cocaine, these effects dissipate after approximately 30 minutes. Some four minutes or more are required to achieve maximum effects after injecting powder cocaine, with the effects lasting for a similar 30 minutes. Powder cocaine that is snorted, on the other hand, takes up to 20 minutes or more to reach maximum psychotropic effect, but the "high" lasts as much as 60 minutes – twice as long as injecting or smoking.

- **Physiological and Psychotropic Effects** (*see* Chapter 2): Cocaine use produces alertness and heightens energy, increases the user's heart rate, elevates blood pressure, and produces symptoms similar to hypertension. Additionally, cocaine acts on the pleasure centers of the brain, causing a sense of euphoria, decreased anxiety and social inhibitions, and heightened sexuality. Increased doses of cocaine, together with the most rapid drug administration routes (*i.e.*, smoking or injecting), produce euphoric experiences that create vivid, long-term psychological memories that, in turn, form the basis for subsequent craving for the drug.

- **Addiction** (*see* Chapter 2): Neither powder cocaine nor crack cocaine are physiologically addictive; however, both are psychologically addictive. Moreover, psychological dependence usually is as devastating as physiological addition. The greater the intensity of cocaine's psychotropic effects and the shorter their duration, the greater the likelihood cocaine use will lead to dependence and abuse. As discussed above and in

Chapter 2, the route of administration determines the intensity and duration of these effects. For a given quantity of cocaine, smoking crack cocaine or injecting powder cocaine produces the most intense physiological and psychotropic effects. However, the ease of smoking, compared to the greater difficulty and unpleasantness involved in injecting any substance, suggests that smoking is more tempting for the first time user and more appealing for the repeat user than is injection. This observation is borne out by the limited available data (*see* Chapter 3), which suggest that almost three times more people smoke cocaine than inject it.

- **Usage Trends** (*see* Chapter 3) Determining patterns and trends of powder and crack cocaine use is difficult. Usage data suggest that casual use of cocaine has diminished while heavy use of cocaine has remained constant.[5] Data on current cocaine usage from the National Household Survey on Drug Abuse show that 75 percent of users snort powder cocaine, 28 percent smoke crack, and 10 percent of cocaine users inject powder cocaine.[6]

- **Importation** (*see* Chapter 4): Crack cocaine is not cultivated or imported independently of powder cocaine. Rather, cocaine is cultivated, processed, imported, and distributed almost exclusively in the powder form at the higher levels of the drug

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[5] Determining patterns in the effects of powder and crack cocaine use is equally difficult. DAWN data report, however, that smoking crack accounts for twice as many hospital emergency room admissions than powder cocaine use.

[6] The sum of the percentages exceeds 100 percent because some respondents report multiple routes of administration.

distribution chain. Some of this powder cocaine is later processed into crack cocaine at the wholesale and retail levels. Wholesale distributors generally smuggle large quantities of powder cocaine into the United States from Colombia, Mexico, and the Caribbean nations through Arizona, southern California, southern Florida, and Texas. The powder cocaine is channeled to what Drug Enforcement Administration (DEA) refers to as "source" cities – Houston, Los Angeles, Miami, and New York City – for distribution throughout the country.

- **Evolution of the Crack Market** (*see* Chapter 4): The types of organizations dominating crack cocaine distribution have undergone an evolution, at least in big-city markets like Los Angeles and New York City. In the early days of crack cocaine sales (1984-1985), freelance distributors operated in a growing, non-competitive market. By 1986, well-organized gangs used violence to consolidate individual dealers and eliminate uncooperative distributors, and, together with small-group distributors, took control of the crack cocaine market. This is a pattern typical of the introduction of new illicit drugs. However, today, researchers and law enforcement officials believe the market is again dominated by a "cottage industry" of small-group and freelance distributors, a deviation from the "normal" pattern. Because these smaller volume distributors now are competing in a market that no longer is expanding, this may indicate that a higher level of violence will continue to be associated with crack cocaine distribution.

- **Forums for Distribution** (*see* Chapter 4): Powder and crack cocaine are distributed at the retail level by similar means, primarily in urban and suburban dwellings and on innercity street corners.

Street-corner or open air sales typically involve small retail quantities sold to walk-up or drive-up buyers. This distribution forum particularly is prone to violence, as security of street-corner transactions often is maintained by lookouts or enforcers who carry firearms. A second cocaine distribution system involves "beepermen" who exchange drugs with a user after having been contacted by telephone or beeper. Crack houses and shooting houses for powder cocaine provide a third forum for distribution and involve the use of a fixed location from which drugs are sold to visiting consumers.

- **Marketability** (*see* Chapter 4): Crack cocaine's ease of manufacture and relatively low cost-per-dose have made it more readily marketable than powder cocaine to large numbers of lower income people. For example, crack can be packaged efficiently and marketed in single-dosage units weighing 0.1 to 0.5 gram and priced from $5 to $20. In contrast, powder cocaine generally is sold by the gram (*i.e.*, five to ten doses) for between $65 and $100 per gram.

- **Cost/Dosage Comparisons** (*see* Chapter 4): Five hundred grams of powder cocaine (the quantity necessary to trigger the five-year mandatory minimum penalty) generally produces 2,500 to 5,000 doses. In contrast, five grams of crack cocaine (the five-year mandatory minimum penalty amount) produces 10 to 50 doses. According to DEA estimates, 500 grams of powder cocaine costs between $32,500 and $50,000. In contrast, five grams of crack cocaine costs between $225 and $750.

- **Role of Juveniles and Women** (*see* Chapter 4): Research indicates that both powder cocaine

and crack cocaine distributors are young, but those distributing crack are younger. For example, in New York City, 38 percent of offenders arrested for distributing crack cocaine were under 21 years of age, compared to 29 percent for powder cocaine. Older crack cocaine dealers tend to use juveniles in visible roles such as lookouts, steerers, and drug runners in the belief that juveniles are more likely to escape detection and prosecution. The DEA suggests that women also have greater roles in crack cocaine distribution relative to distribution of other drugs. As with juveniles, women are used in more visible roles (such as, making straw purchases of firearms and renting residences to use as crack stash houses) because of the perceived decreased likelihood of detection and prosecution perception.

- **Violence** (*see* Chapter 5): Crack cocaine is associated with systemic crime – crime related to its marketing and distribution – to a greater degree than powder cocaine. Researchers and law enforcement officials report that much of the violence associated with crack cocaine stems from attempts by competing factions to consolidate control of drug distribution in urban areas. Some portion of the distribution of powder cocaine, and the majority of the distribution of crack cocaine, is done on street-corners or in open-air markets, crack houses, or powder shooting galleries between anonymous buyers and sellers. These distribution environments, by their very nature, are highly susceptible to conflict and intense competition. As a result, individuals operating in these surroundings are prone to be involved in, as well as victimized by, increased levels of violence. Consistent with its distribution forums, crack offenders are more likely to carry weapons than

individuals trafficking in other drugs (27.9% of crack offenders possess dangerous weapons compared to 15.1% of powder cocaine offenders – *see* Chapter 7) and are more likely to have more extensive criminal records (10.4% of crack cocaine defendants have the highest criminal history category compared to 4.8% for powder cocaine defendants – *see* Chapter 7).

Many cocaine users, both crack and powder, sell drugs to raise money to support their drug habits. There is little empirical evidence, though, to suggest that either crack or powder cocaine users commit large numbers of violent acts to raise money to buy drugs. However, some research reports a significant percentage of petty property offenses and trading sex for drugs associated with crack cocaine use. Furthermore, one study reports that 98 percent of crack users sell drugs to help support their habits. The Commission finds no research to suggest, however, that powder cocaine users are any less likely to commit crimes to support their habits.

Studies report that neither powder nor crack cocaine excite or agitate users to commit criminal acts and that the stereotype of a drug-crazed addict committing heinous crimes is not true for either form of cocaine.

- **HIV/STD Transmission** (*see* chapter 3): Crack cocaine smokers and powder cocaine injectors exhibit more high-HIV-risk behavior than powder cocaine snorters, but for different reasons. Intravenous powder cocaine use presents a higher risk of HIV infection than heroin and other IV-injected drugs because of the relatively short-lived euphoria of cocaine (*i.e.*, cocaine injectors are likely to reinject more frequently to sustain the high, thereby presenting a greater risk of acquiring the

HIV virus through contaminated needles). Research also shows that, compared to powder cocaine injectors, crack smokers exhibit more high-risk sexual behaviors, including multiple sexual partners, sex without condoms, and sexual activity during or following drug use. Given such behaviors, crack cocaine users also are more likely to contract other sexually transmitted diseases like syphilis and gonorrhea. Additionally, sex-for-drugs – while not unique to crack cocaine – thrives in venues like crack houses. Consequently, the rates of HIV infection are nearly equal between crack smokers and powder cocaine injectors.

- **Effects on Fetus** (*see* Chapter 3): Cocaine use by pregnant women can produce detrimental effects on the fetus that include premature delivery, brain lesions, and malformed limbs. In general, however, reliable information comparing babies born to mothers using crack versus those born to mothers using powder is not available, because medical tests cannot distinguish between the presence of crack as opposed to powder in mother or newborn child. Unless the mother self-reported crack cocaine use, blood tests would simply reveal the presence of cocaine. Nevertheless, because crack cocaine produces more intense "highs" and quicker "lows" than powder cocaine, crack users are more likely to use increased quantities of the drug or to engage in binging. Such practices by pregnant women expose their babies to greater quantities of the drug and, thus, greater potential for harm. Furthermore, babies exposed to crack may experience greater problems because crack smokers achieve a higher concentration of the drug in their bloodstreams than do cocaine snorters. While data are sketchy at best, one researcher

estimates that 7.5 percent to 17 percent of all pregnant women use illicit drugs during their pregnancy, resulting in 100,000 to 740,000 drug-exposed babies each year. The estimate of cocaine-exposed babies ranges from 30,000 to 160,000.

- **"Boarder Babies" and Maternal Neglect** (*see* Chapter 3): The Commission's research reveals virtually no studies that address concerns related specifically to crack cocaine use and maternal neglect, teenage pregnancy, and the phenomenon of "boarder babies." That these societal problems exist seems quite clear, but research has focused on the association of these problems to substance abuse in general as opposed to their association with powder or crack cocaine. Furthermore, that these phenomena coincide with a rise in crack cocaine use leads many to believe that the two are related. Research necessary to support or refute that relationship has not been done.

  Many states consider the birth of drug-exposed infants to be evidence of maternal neglect. Several states have enacted laws that allow child abuse charges to be brought against any woman with illegal drugs in her bloodstream who gives birth to a child. Other states simply remove drug-exposed babies from their mothers, making them wards of the state. Some states have tried these methods and rejected them in favor of mandatory treatment programs in which mothers must enter treatment or lose their children.

- **State Distinctions** (*see* Chapter 6): Thirty-six states do not distinguish between powder cocaine and crack cocaine in their statutory penalty structures. No state has elected to follow, in its entirety, the federal penalty scheme for powder and crack cocaine offenses and none provides a differential

between powder and crack cocaine that approaches the federal system's 100-to-1 quantity ratio at the five-and ten-year mandatory minimum levels.[7]

- **Prosecutorial Discretion** (*see* Chapter 6): Federal cocaine prosecutions vary widely by district. For example, four defendants were sentenced for trafficking in less than 50 grams of crack cocaine in the Central District of California (which includes Los Angeles) in 1993. By comparison, 111 defendants were sentenced for the same offense during the same period in Washington, D.C. In 1993, the Southern District of West Virginia sentenced 113 offenders for trafficking in any amount of crack cocaine; the Eastern District of New York – which includes Brooklyn – sentenced 24. During the same period, the Southern District of West Virginia sentenced 41 offenders for trafficking in powder cocaine compared to Eastern New York's 175.[8]

- **Demographic/Offender Information** (*see* Chapter 7): The data show that federal crack cocaine offenders, on average, are younger than federal powder cocaine offenders, have somewhat less

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[7] North Dakota provides a 100-to-1 distinction between powder and crack cocaine but limits it to the five-year mandatory minimum amounts.

[8] The Commission does not mean to suggest that any apparent disparities are unwarranted. As a general matter, the Commission has not analyzed various factors that might explain these and other differences, including the strength of the state and local law enforcement efforts directed at the crack cocaine trade, the relative punishment available through state statutes, differing needs and problems facing each district, and resource allocation issues.

education, and have more extensive prior criminal records. Crack cocaine defendants also are more likely to possess a weapon.

- **Race** (*see* Chapter 7): Blacks accounted for 88.3 percent of federal crack cocaine distribution convictions in 1993, Hispanics 7.1 percent, Whites 4.1 percent, and others 0.5 percent. The racial breakdown for powder cocaine distribution offenses sentenced in 1993 shows 32.0 percent White, 27.4 percent Black, 39.3 percent Hispanic, and 1.3 percent other. On the other hand, the 1991 Household Survey shows that 52 percent of those reporting crack *use* in the past year, as opposed to distribution, were White, 38 percent were Black, and 10 percent Hispanic; 75 percent of those reporting powder *use* in the past year were White, 15 percent were Black, and 10 percent Hispanic (see Chapter 3).[9]

Based on this limited information, the Sentencing Commission identifies the following concerns:

1) **Racial Disparity**: Federal sentencing data leads to the inescapable conclusion that Blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine. This does not mean, however, that the penalties are racially motivated. Clearly the penalties (both statutory and guideline-based) apply equally to similar defendants regardless of race. Many individual criminal statutes, when enforced, produce a pool of

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[9] The National Household Survey potentially underrepresents lower-income populations and overrepresents middle or upper-income populations or those who reside in households.

defendants who are not representative of the racial make-up of criminal law violators generally or of society. However, as all appellate courts have found, there is no evidence that Congress or the Sentencing Commission acted with any discriminatory intent in setting different statutory and guideline penalties for different forms of cocaine.

Nevertheless, the high percentage of Blacks convicted of crack cocaine offenses is a matter of great concern to the Sentencing Commission. Penalties clearly must be racially neutral on their face and by design. The Sentencing Commission is committed to these goals. When one form of a drug can be rather easily converted to another form of the same drug and when that second form is punished at a quantity ratio of 100 times greater than the original form, it would appear reasonable to require the existence of sufficient policy bases to support such a sentencing scheme regardless of racial impact. Moreover, when such an enhanced ratio for a particular form of a drug has a disproportionate effect on one segment of the population, it is particularly important that sufficient policy bases exist in support of the enhanced ratio.

Further, it is instructive that – although appellate courts have not found the 100-to-1 quantity ratio constitutionally deficient – some have commented upon the problematic nature of the sentencing scheme from a policy standpoint[10] and further indicated that the resolution

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[10] *See United States v. Singleterry*, 29 F.3d 733, 741 (1st Cir.), *cert. denied*, 115 S.Ct. 647 (1994).

of such questions is better left to those with the proper authority and institutional capacity.[11]

2) **Quantifying Harm**: Some argue that a sentencing system must punish different forms of the same drug equally. The Sentencing Commission disagrees. If a particular form of a drug results in greater harms than a different form of that drug, then logically a harsher penalty for the more harmful drug can be justified. In assessing the relative harms posed by the two forms, the aim is to arrive at a penalty differential that approximates the increased dangers posed by the more harmful drug.

The Sentencing Commission maintains, however, that there are better ways to achieve the desired result. Recognizing that Congress has ultimate authority over sentencing policy, the question becomes how Congress can best translate its judgment as to appropriate levels of punishment severity into sentences imposed. To a degree, Congress has already spoken on this issue. Because of its ability to accommodate the vast array of relevant offense/offender characteristics, the guidelines system established by Congress is superior to an approach based solely on automatic ratios and mandatory minimums, including mandatory minimums for powder and crack cocaine offenses. Congress has effectively communicated its policies on sentencing through the Sentencing Reform Act and subsequent legislation. It has continuing oversight of the work of the Sentencing Commission through the statutory requirement that proposed guidelines and

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[11] *See United States v. Frazier*, 981 F.2d 92, 96 (3rd Cir. 1992); *see generally* Appendix C.

amendments to guidelines be submitted to Congress for 180-day review before they become effective.

3) **Level Within the Drug Chain**: The substantial difference in the ratio between crack and powder cocaine punishes the retail dealer of crack far more severely than the powder cocaine supplier who may have sold the powder cocaine from which multiple street dealers made crack. This issue, however, cannot be viewed in the abstract, because concerns over street violence and other harms affect the determination of an appropriate quantity ratio. Nevertheless, five grams of crack cocaine – the quantity that triggers a five-year mandatory minimum penalty – appears to be much more a retail quantity than 500 grams of powder cocaine – the quantity of powder cocaine necessary to trigger the five-year mandatory penalty. Consequently, retail-level crack cocaine dealers are being punished like wholesaler- and importer-level powder cocaine dealers.

For example, under the 100-to-1 quantity ratio, a wholesaler convicted of moving five kilograms of powder cocaine may receive a lesser sentence than a distributor who buys one of the five kilograms but is caught after having converted the powder into crack cocaine. This anomalous result highlights the fact that individuals higher in the cocaine distribution chain can be punished less severely than certain lower-level traffickers because of the intervening change in the form of cocaine, *i.e.*, the change to crack.

4) **Societal Concerns**: Congress and the public are troubled by the apparent relationship between crack and

societal problems, particularly in American cities. The Sentencing Commission shares these concerns.

Many Americans do not feel safe walking the streets, driving in their automobiles, or even sitting in their homes for fear of stray bullets from drive-by shootings or disputes between rival drug traffickers. The medical community sees increased incidence of gunshot victims, infants born exposed to drugs, boarder babies, HIV/AIDS and other sexually transmitted diseases, and increasingly younger victims and perpetrators of violent crime. The use of women and youth to facilitate the drug trade seems higher at this point in the country's history than ever before, with no clear answer as to why this may be true.

There has been significant growth in the rate of drug-exposed infants in this country, with nine percent or 350,000 babies each year exposed to drugs in the womb. Certainly, the rate of cocaine-exposed babies continues to rise. And while medical science cannot distinguish between the two forms of cocaine, certain factors put crack-exposed babies at greater peril; because the highs and lows associated with drug use are quicker when using crack cocaine, crack users are more likely to use increased quantities of the drug or engage in binging, exposing the infant to greater quantities of the drug and, thus, to more harm.

With the growth in drug-exposed babies has come an increase in maternal neglect and the phenomenon of boarder babies. In general, studies have not focused on a particular drug type when studying these issues, instead looking broadly at the question of substance abuse. The

problem of substance abuse among women and its effect on children raises serious policy concerns.

As Americans have watched these devastating changes to their everyday lives, they also have witnessed the proliferation of crack cocaine sale and use. While there is some indication that crack use is declining, it is difficult to ignore the potential association between these phenomena.

In summary, while it is true that powder cocaine and crack cocaine pharmacologically are the same drug and equally true that neither form of cocaine is physiologically addictive, important distinctions between the two may warrant higher penalties for crack than powder. For example, factors in the route of administration (*i.e.*, smoking versus snorting) and attributes of the crack cocaine market make crack different from powder from a policy perspective. These factors generally include: 1) a greater risk for psychological addiction due to the rapid high and concomitant rapid low resulting from inhalation of crack; 2) because powder cocaine can be converted easily into smaller doses of crack that can be sold more cheaply and in potent quantities, crack is more readily available to a larger segment of the population, particularly women, children, and the economically disadvantaged; 3) the apparently higher correlation between crack and violence than between powder and violence; and 4) the increased use of young people in the distribution of crack.

Even so, given its review of the subject, the Sentencing Commission cannot support the current penalty scheme. The factors that suggest a difference between the

two forms of cocaine do not approach the level of a 100-to-1 quantity ratio. Research and public policy may support somewhat higher penalties for crack versus powder cocaine, but a 100-to-1 quantity ratio cannot be recommended.

Notwithstanding the Sentencing Commission's broad examination of these issues, much more research is needed into the distinctions between powder and crack cocaine. To the extent practicable, medical and social science research, as well as law enforcement arrest data, must distinguish between the two forms of cocaine. The present failure to distinguish between crack and powder in data on arrests, cocaine-exposed babies, maternal neglect and substance abuse, and violence associated with drug use and distribution continuously frustrated the Commission's study.

Recommendation: The Sentencing Commission shares congressional and public concern about the harms associated with crack cocaine – both to users and to the society as a whole – including the violence associated with its distribution, its use by juveniles, the involvement of women and juveniles in its distribution, and its addictive potential. However, the Sentencing Commission concludes that Congress's objectives with regard to punishing crack cocaine trafficking can be achieved more effectively without relying on the current federal sentencing scheme for crack cocaine offenses that includes the 100-to-1 quantity ratio.

Rather than propose a specific statutory change in the current 100-to-1 quantity ratio, the Sentencing Commission recommends that the guidelines system be

revised to further the purposes of sentencing and to address congressional concerns. Given the Sentencing Reform Act of 1984, the most efficient and effective way for Congress to direct cocaine sentencing policy is through the established process of sentencing guidelines, rather than relying solely on a statutory distinction between the two forms of the same drug. This has not yet occurred because the current guideline sentencing scheme was overlaid onto the already existing mandatory minimum structure for cocaine sentencing that Congress created in 1986. The current sentencing scheme, therefore, should be amended to account for and punish more fully and appropriately for the dangers associated with both crack and powder cocaine.

A number of related sentencing policies currently under consideration by Congress and the Sentencing Commission may affect the final sentencing scheme for cocaine. For example, the Commission is now considering amendments concerning the use of juveniles in offenses, gang involvement, and the drug guidelines generally. Congress is considering changes to sentences for offenses involving firearms and enhanced penalties for drug sales to, or distribution involving, minors.

As a priority matter upon completion of this report, the Sentencing Commission will further develop appropriately weighted guideline enhancements (*i.e.*, specific offense characteristics, general adjustments, offender characteristics) corresponding to important offense and offender characteristics present in crack cases that justify higher sentences. The guidelines currently provide enhancements for a number of societal harms associated with crack; to the extent Congress factored in these same

harms in establishing the 100-to-1 quantity ratio, double punishment occurs. If guideline enhancements cannot sufficiently account for harms associated with crack, the guidelines can provide an increased ratio through the base offense level. Workable guideline provisions can be developed to account fully for harms related to crack and powder cocaine without the difficulties associated with an automatic 100-to-1 ratio.

In setting these guidelines, the Commission will consider, to the extent relevant to congressional concern and the purposes of sentencing as set forth at 18 U.S.C. § 3553(a)(2), the following: 1) the form of cocaine involved; 2) whether a firearm or other dangerous weapon was involved; 3) whether the offense resulted in serious bodily injury or death to another person; 4) the quantity of cocaine involved; 5) the extent to which the powder cocaine defendant knew the drug would be converted into crack; 6) the extent to which the offense involved systemic crime, that is, crime related to the drug's marketing, distribution, and control; 7) the extent to which the offense involved social harms, that is, harms associated with increased addictiveness, parental neglect, child and domestic abuse, and high risk sexual behaviors; 8) whether the offense involved the use or employment of any person under the age of 18; 9) whether the defendant performed a managerial or leadership role in the offense; 10) the defendant's prior criminal record; and 11) any other aggravating or mitigating factors necessary to ensure adequate and appropriate punishment for defendants convicted of cocaine offenses.

Assuming that the guidelines can be reshaped to account more fully for the heightened harms associated

with crack, grounds may still exist for differentiating between otherwise similar crack and powder cocaine offenses. Any such differential could be implemented through guideline base offense levels and would represent the Sentencing Commission's best judgment regarding a more appropriate quantity ratio between powder and crack cocaine. However, until the possibility has been thoroughly explored of using specific guideline enhancements to account for the more significant societal harms associated with crack, the Sentencing Commission cannot state definitively that some base differential is warranted and whether that differential should be guideline-based or statutory.

The Sentencing Commission contemplates that this guideline refinement procedure can be accomplished within the current and next amendment cycles, resulting in the submission to Congress no later than May 1, 1996, of a comprehensive revision of the guidelines applicable to cocaine offenses.

The considerations described above similarly warrant congressional reconsideration of the dramatic distinction in simple possession penalties for crack versus powder cocaine and other drugs. The Sentencing Commission recommends that Congress revisit the unique penalties for simple possession of crack enacted in 1988 and, as with the trafficking penalty scheme, afford sufficient latitude for the Commission to design a fairer, more proportional approach within the guidelines structure.

Having broadly delegated to the Sentencing Commission responsibility for developing a comprehensive and rational system of sentencing guidelines for all offenses,

Congress should consider relying on the same approach to implement appropriate policy adjustments in this specific area. Among other advantages, this approach would permit the Sentencing Commission, which is responsible for continually refining the guidelines system, greater flexibility to make adjustments reflecting advances in knowledge about the impact of cocaine on society. Most importantly, through the guidelines system, consistent, appropriately individualized, and substantially fairer outcomes can be achieved that effectively promote the concerns of Congress as identified in the statutory purposes of sentencing.

CHAPTER I: BACKGROUND AND METHODOLOGY

A Note On Terminology And Drawing Conclusions Pages 5-6

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E. A NOTE ON TERMINOLOGY AND DRAWING CONCLUSIONS

The following definitions explain selected terms commonly referred to in this report.

Powder cocaine refers to cocaine hydrochloride.

Cocaine base refers to cocaine in a base form. Cocaine base includes coca paste, other intermediate forms of cocaine, freebase cocaine, and crack cocaine.

Crack cocaine refers to a specific smokable base form of cocaine derived from powder cocaine through a process that chemically separates hydrochloric acid from the cocaine alkaloid.

> *100-to-1 quantity ratio* refers to the comparative amounts of powder cocaine and crack cocaine needed to trigger the five- and ten-year mandatory minimum penalties mandated by 21 U.S.C. § 841(b)(1).

Finally, when undertaking this study, the Commission was frustrated by limitations in the current research. We wish we know more than we do before setting policy in this area. Throughout the report, limitations in the available data are noted and we call for additional research where it is especially needed. The conclusions drawn are made cautiously with these qualifications in mind.

At the same time, we recognize that there are also limitations in drawing conclusions based only on isolated instances, anecdotes, news media reports, or even based on "common sense," which can be distorted by stereotypes or by the conventional wisdom of the day. We believe that the research presented here provides new information and a more sound basis for setting policy than was available to Congress when it acted and to the Commission when it promulgated the original guidelines. Accordingly, it is fitting to reexamine this important area in light of a fuller understanding of the problem of cocaine in America.

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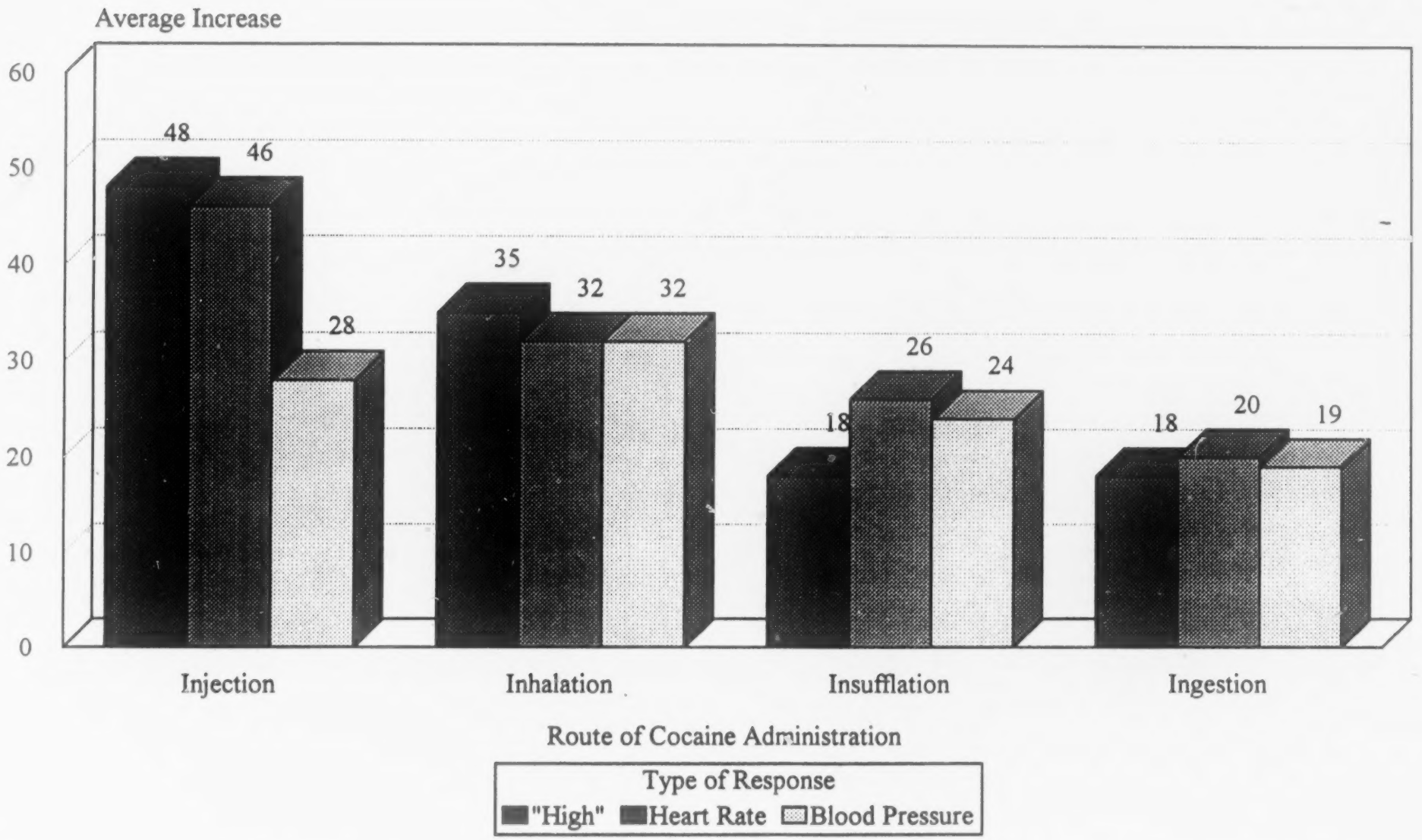
CHAPTER II: COCAINE, ITS FORMS, METHODS OF USE, AND PHARMACOLOGY

Pages 17 – Figure 3
Pages 29 – Table 2

Figure 3

AVERAGE INCREASE IN PHYSIOLOGICAL AND PSYCHOTROPIC RESPONSES BY ROUTE OF ADMINISTRATION



"High" measured by subjective self-report scale.
Heart rate measured in beats per minute (BPM).
Blood pressure measured in mmHg for Systolic Blood Pressure.

SOURCE: R.T. Jones, "The Pharmacology of Cocaine Smoking in Humans," 99 NIDA Research Monograph 30.

Table 2

COMPARISON OF POWDER COCAINE AND CRACK COCAINE

	Powder Cocaine	Crack Cocaine*
Source	Coca plant	Coca plant
Active Ingredient	Cocaine	Cocaine
Administration	Injection Insufflation ("snorting") Ingestion	Inhalation (smoking)
Time until entry into bloodstream	Injection: 0 seconds Insufflation: 5 minutes Ingestion: 30 minutes	9.5 seconds
Time until entry into brain	Injection: 4 minutes Insufflation: 5 minutes Ingestion: 30 minutes	19 seconds
Time to maximum physiological effect	Injection: 10 minutes Insufflation: 40 minutes Ingestion: 60 minutes	2 minutes
Time to maximum psychotropic effect	Injection: 4 minutes Insufflation: 20 minutes Ingestion: 60 minutes	1 minute
Duration of effect	Injection: 30 minutes Insufflation: 60 minutes Ingestion: 60 minutes	30 minutes
Type of addiction	Psychological	Psychological
Risk of addiction	Yes	Yes
Aberrant behavior and psychoses	Yes	Yes
Poly-drug use	Yes. Most cocaine-related medical emergencies involve alcohol abuse; most cocaine-related deaths result from combination abuse with opiates or alcohol	Yes. Most cocaine-related medical emergencies involve alcohol abuse; most cocaine-related deaths result from combination abuse with opiates or alcohol

*These characteristics of crack cocaine smoking also apply to other forms of cocaine base which are inhaled, including coca paste and freebase cocaine.

CHAPTER III: COCAINE USE AND PUBLIC HEALTH ISSUES

Race and Trends in Cocaine Use
Pages 38-beginning of 40

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c. Race and Trends in Cocaine Use

Public opinion tends to associate the country's drug crisis, specifically its perceived "crack problem," with Black, innercity neighborhoods.[10] The NHSDA found that cocaine in any form was used by 2.8 percent of Whites, 3.9 percent of Blacks, and 3.8 percent of Hispanics in the survey population during the 1991 reporting year.[11] Because Blacks and Hispanics comprise significantly smaller percentages of the total population, the majority of those reporting cocaine use were White. The survey found that of those reporting cocaine use at least once in the reporting year, 75 percent were White, 15 percent Black, and 10 percent Hispanic. And of those reporting crack use at least once in the reporting year, 52 percent were White, 38 percent were Black, and 10 percent were Hispanic. (Thus, within racial categories, 0.3% of Whites, 1.5% of Blacks, and 0.6% of Hispanics reported crack cocaine use at least once in the reporting year.)

The survey found that of those reporting any form of cocaine use at least once in their lifetime, 82 percent were

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[10] M. Fullilove, "Perceptions and Misperceptions of Race and Drug Use," 269 *Journal of the American Medical Association* 1034 (Feb. 24, 1993).

[11] NHSDA: 1991, *supra* 1, at 56.

White, 10 percent Black, and 8 percent Hispanic (within racial categories, 11.8% of White, 11.2% of Blacks, and 11.1% of Hispanics reported some form of cocaine use in their lifetime). Of those reporting crack cocaine use at least once in their lifetime, 65 percent were White, 26 percent Black, and 9 percent Hispanic (within racial categories, 0.3% of Whites, 1.5% of Blacks, and 0.6% of Hispanics).[12] Because so few report crack use in the past month, NIDA does not publish a racial breakdown of those figures.[13] Percentages of use by race have shifted somewhat over time, but percentages of all races using cocaine have steadily declined since 1985.[14]

A significant limitation on the observations that may be made from data on race and cocaine use trends is that race is highly correlated with place of residence, and neighborhood-level social and environmental conditions are significant factors driving drug abuse. Also, as will be discussed in Chapter 4, the ability to distribute crack cocaine in single-dose amounts makes crack cocaine more marketable in lower-income neighborhoods than powder cocaine, sold only in larger, more expensive quantities.

A recent study reanalyzed NHSDA data using neighborhood and social condition explanatory factors. The analysis found that crack cocaine smoking did not depend strongly on the race of the individual, but instead on social conditions. The study noted that if factors such

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[12] *See, e.g.*, S. Belenko, *Crack and the Evolution of Anti-Drug Policy* (1993).

[13] *Id.* at 49-50. Of Blacks using cocaine, more than twice as many reported using powder cocaine than using crack cocaine.

[14] NHSDA: 1991, *supra* note 1.

as drug availability and social conditions are held constant, the odds of crack cocaine use within a population do not differ significantly by race/ethnicity.[15] Consistent with this, a study in the Miami, Florida metropolitan area, which recruited a street-based sample of 350 cocaine users, found few differences in level of crack use among participants aged 13-29 years based on the race of the individual. With the exception of one sub-group (Hispanics aged 20-29 years), more than 90 percent of participants reported that crack was the primary form of cocaine used, regardless of race. The authors also report that among older cocaine users (aged 30-49 years), Whites are more likely to report crack as the primary form of cocaine used and Blacks are least likely to use crack as their primary form of cocaine ingestion.[16]

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[15] M. Lillie-Blanton, J. Anthony, and C. Schuster, "Probing the Meaning of Racial/Ethnic Group Comparisons in Crack Cocaine Smoking," 269 *Journal of the American Medical Association* 993, 996 (Feb. 24, 1993).

[16] Lockwood, D., Pottieger, A., Inciardi, J. *Crack Use, Crime by Crack Users, and Ethnicity*. For publication in: Darnell F. Hawkins (ed) *Ethnicity, Race and Crime*, Suny Press, 1994. *See also* United States Sentencing Commission, *Hearing on Crack Cocaine* 73-75 (statement of Dr. Jerome H. Skolnick, Professor of Law at the University of California at Berkeley) for further support of this funding.

CHAPTER V: COCAINE AND CRIME

Cocaine In Context: 1. The Social Context of Cocaine Distribution

Pages 104-beginning of 106

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C. COCAINE IN CONTEXT

This section provides additional context for evaluating the crime associated with cocaine.

1. The Social Context of Cocaine Distribution

All three panelists testifying on the association between crack cocaine and violence at the Sentencing Commission hearing stressed that crack/crime associations cannot be assessed in isolation from the social environment in which the marketplaces for these drugs occur.[72] Dr. Skolnick stressed the importance of the varying gang cultures in which cocaine trafficking, including crack cocaine, is often a part. He observed that it is "the underlying culture of the gangs in a particular area that accounts for the violence more than anything else."[73]

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[72] Commission Hearing, *supra* note 2, at 80.

[73] *Id.* at 70. Dr. Skolnick's observation appears supported by a recently study conducted for the National Institute of Justice. E. Walsh, "Chicago Street Gang Study Shows Fearful Toll of Powerful Weapons," Washington Post A4 (Nov. 29, 1993) (citing to study conducted by Carolyn Rebecca Black and Richard Black). That study concluded that gang turf battles in many areas were more likely to lead to homicides than drug trafficking disputes.

Dr. Belenko pointed to a range of concurrent non-cocaine forces that he indicated undermine a conclusion that cocaine in general and crack cocaine in particular cause crime:

> [W]hile the crack subculture can be characterized as more violent and crime-involved compared with previous or parallel drug subcultures, the reasons for this are quite complex and probably not a function of any psychopharmacological effects. Thus, the media and public fears of a direct causal relationship between crack and other crimes do not seem to be confirmed by empirical data. Rather, the levels of violence and crime associated with crack appear to reflect parallel and other interactive forces that are related to the relative immaturity and volatility of the crack markets, the ages and types of persons initially attracted to crack distribution, the increasing social and economic disorganization of the nation's inner cities beginning in the 1980's, and the mounting proliferation of more powerful guns, as well as a spread of cheaper powder cocaine during the same period of time.[74]

Other researches have made similar observations about the importance of non-crack factors. Socioeconomic factors, for example, are thought by many to impact directly on the drug/violence relationship. Some sociologists theorize that deviant behavior is more likely to occur in a situation in which individuals lack access to legitimate means to achieve their economic goals.[75]

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[74] *Id.* at 59.

[75] See 1990 Fagan Intoxication Study, *supra* note 4, at 274.

Others postulate that "in conditions in which law and governmental social control are least developed, violence would be more evident as a form of social control."[76] The 1990 Fagan and Chin study discussed these theories in relation to the crack economy in the innercity.

Fagan and Chin considered crack cocaine development during a concurrent decline in the lawful economy of innercity neighborhoods. Citing evidence of heavy innercity job loss during a time of job creation in surrounding suburbs and the fact that small-scale sellers were able to participate in the income-generating crack cocaine market, the authors observed that crack cocaine distribution attracted participants at a time when economic and social counterweights to the underground economy were seriously diminishing.[77]

Noting "that the vast majority of [residents] in innercity communities are not cocaine or heroin abusers or criminals," Bruce Johnson *et al.* similarly found that such factors as the prospects of employment in the crack trade for young persons "who most likely would be otherwise unemployed" played a role in expanding "the criminal underclass subculture."[78] In sum, whatever the precise effects of social and environmental factors, a number of researchers stress their relevance in considering both the

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[76] *See* 1990 Fagan/Chin Study, *supra* note 4, at 13.

[77] 1990 Fagan/Chin Study, *supra* note 4, at 10-12.

[78] B. Johnson, T. Williams, K. Dei, and H. Sanabaria, "Drug Abuse in the Inner City: Impact of Hard-Drug Use and Sales on Low Income Communities," in M. Tonry and J. Wilson (Eds.), 13 *Crime and Justice, An Annual Review of Research* 9-68 (1990) (hereinafter "1990 Johnson *et al.* Inner City Study").

rapid development of crack cocaine and crack's association with crime.

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CHAPTER VI: THE NATIONAL LEGISLATIVE AND LAW ENFORCEMENT RESPONSE TO COCAINE

The Role of the Media and Public Opinion & The Anti-Drug Abuse Act of 1988
Pages 121-123

Table 4 – Pages 135-136
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4. The Role of the Media and Public Opinion

As stated above, the 1986 Act was notable for the speed of its development and enactment.[39] Congressional urgency is chronicled in the legislative history. Drug abuse in general, and crack cocaine in particular, had

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[39] *See* 132 Cong. Rec. 31,329 (Oct. 15, 1986) (statement of Sen. Chiles) ("it is historical for the Congress to be able to move this quickly"); 132 Cong. Rec. 26,449 (Sept. 26, 1986) (statement of Sen. Rockefeller) ("I know it seems to some that we are moving too fast and frenetically to pass drug legislation."). Some members were critical of the speed with which the bill was considered. *See, e.g.*, 132 Cong. Rec. 26,462 (Sept. 26, 1986) (statement of Sen. Mathias) ("Very candidly, none of us has had an adequate opportunity to study this enormous package. It did not emerge from the crucible of the committee process."); 132 Cong. Rec. 22,658 (Sept. 10, 1986) (statement of Rep. Lott) ("In our haste to patch together a drug bill – any drug bill – before we adjourn, we have run the risk of ending up with a patchwork quilt . . . that may not fit together into a comprehensible whole.").

become in public opinion and in members' minds a problem of overwhelming dimensions.

Recalling recent drug-related deaths of the Boston Celtics' first-round basketball draft pick, Len Bias, and Don Rogers of the Cleveland Browns professional football team, members of Congress repeatedly described the dimensions of the drug problem in such dramatic terms as "epidemic."[40] Against this background, Senator Hawkins spoke in support of the 1986 Act, reflecting the sentiment for urgent legislation:

> Drugs pose a clear and present danger to America's national security. If for no other reason we should be addressing this on an emergency basis . . . This is a bill which has far-reaching impact on the future as we know it as Americans and as we mature into the next century.[41]

The media played a large role in creating the national sense of urgency surrounding drugs, generally and crack cocaine specifically. Whether the media simply reported an urgent situation or rather itself created an exigency has been and will continue to be debated. What is clear, however, is that the crack problem in the United States coincided with large-scale print media and network news coverage of crack.

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[40] *E.g.*, 132 Cong. Rec. 26,436 (Sept. 26, 1986) (Statement of Sen. Biden); 132 Cong. Rec. 26,444 (Sept. 26, 1986) (Statement of Sen. Deconcini); 132 Cong. Rec. 8,091 (June 20, 1986) (Statement of Sen. D'Amato); 132 Cong. Rec. 8,092 (June 20, 1986) (Statement of Sen. Mattingly).

[41] 132 Cong. Rec. 26,436 (Sept. 26, 1986).

Crack cocaine was first mentioned in the media by the Los Angeles Times on November 25, 1984, referring to a cocaine "rock" that was appearing in the barrios and ghettos of Los Angeles. The New York Times first mentioned crack in a story on November 17, 1985. The coverage increased and intensified over time. In the months leading up to the 1986 elections, more than 1,000 stories appeared on crack in the national press, including five cover stories each in Time and Newsweek. NBC news ran 400 separate reports on crack (15 hours of airtime).[42] Time called crack the "Issue of the Year" (September 22, 1986). Newsweek called crack the biggest news story since Vietnam and Watergate (June 16, 1986). CBS News aired a documentary entitled "48 Hours on Crack Street."

Some assertions made in these reports were not supported by data at the time and in retrospect were simply incorrect. One report in 1986, for example, labeled crack cocaine as "America's drug of choice." At the time, however, there were no prevalence statistics on the use of crack.[43] The first statistics on crack cocaine use compiled by NIDA subsequent to the report showed that snorting powder cocaine was still the preferred method of ingestion by 95 percent of cocaine users.[44]

Another example is the coverage surrounding the death of Len Bias in June 1986. Bias died of cocaine

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[42] C. Reinarman and H. Levine, "The Crack Attack: Politics and Media in America's Latest Drug Scare," in J. Best (Ed.), *Images of Issues: Typifying Contemporary Social Problems* 117 (1989).

[43] *Id.* at 121.

[44] *Id.*

intoxication the day after he was the second player drafted in the National Basketball Association's college draft in 1986. The method of cocaine ingestion that killed Bias was not known at the time of his death. Nonetheless, following Bias's death, newspapers across the country ran headlines and stories containing a quote from Dr. Dennis Smyth, Maryland's Assistant Medical Examiner, that Bias probably died of "free-basing" cocaine. Newspapers that ran such headlines included the Los Angeles Times, USA Today, the Chicago Tribune, The Atlanta Constitution, and the Washington Post.[45]

A few weeks after Bias's death, on July 15, 1986, the United States Senate's Permanent Subcommittee on Investigations held a hearing on crack cocaine. During the debate, Len Bias's case was cited 11 times[46] in connection with crack. Eric Sterling, who for eight years served as counsel to the House Judiciary Committee and played a significant staff role in the development of many provisions of the Drug Abuse Act of 1986, testified before the United States Sentencing Commission in 1993 that the "crack cocaine overdose death of NCAA basketball star

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[45] Dr. Smyth based his assertion on the fact that there were high concentration levels of cocaine in Bias's bloodstream. The previous week, however, Dr. Yale Caplan, a toxicologist in Maryland's Medical Examiner's Office shad that the test of cocaine found in the vial at the scene "probably was not crack." And Maryland's Chief Medical Examiner, Dr. John E. Smialek, stated that the evidence suggests that Bias snorted cocaine due to the residue of cocaine in the nasal passages. Dr. Smyth's assertions, however, received the bulk of the coverage.

[46] *See* transcript of the "Crack Cocaine" hearing before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99th Congress.

Len Bias"[47] was instrumental in the development of the federal crack cocaine laws. During July 1986 alone, there were 74 evening news segments about crack cocaine, many fueled by the belief that Bias died of a crack overdose.[48]

Not until a year later, during the trial of Brian Tribble who was accused of supplying Bias with the cocaine, did Terry Long, a University of Maryland basketball player who participated in the cocaine party that led to Bias's death, testify that he, Bias, Tribble, and another player snorted powder cocaine over a four-hour period. Tribble's testimony received limited coverage.

5. The Anti-Drug Abuse Act of 1988

Congress further underscored its concern about drugs generally, and crack cocaine specifically, in the Anti-Drug Abuse Act of 1988.[49] The most far-reaching change of the Anti-Drug Abuse Act of 1988 applied the same mandatory minimum penalties to drug trafficking conspiracies and attempts that previously were applicable only to substantive, completed drug trafficking offenses. Furthermore, with respect to crack cocaine, the Act amended 21 U.S.C. § 844 to make crack cocaine the only drug with a mandatory minimum penalty for a first offense of simple possession. The Act made possession of

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[47] *See* testimony of Eric Sterling before the United States Sentencing Commission on proposed guideline amendments, public comment, March 22, 1993.

[48] Reinarman and Levine, *supra* note 42, at 117.

[49] Pub. L. No. 100-690, 102 Stat. 4181 (1988).

more than five grams of a mixture or substance containing cocaine base punishable by at least five years in prison. The five-year mandatory minimum penalty also applies to possession of more than three grams of cocaine base if the defendant has a prior conviction for crack cocaine possession, and to possession of more than one gram of crack if the defendant has two or more prior crack possession convictions.

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Table 4

STATE SURVEY

State	Crack Cocaine/ Powder Cocaine Distinction	Guidelines System	Determinate Sentencing	Mandatory Minimums
Alabama	Yes	No	No	Yes
Alaska	No	No	Yes	Yes
Arizona	No	No	No	Yes
Arkansas	No	Yes	Yes	No
California	Yes	No	Yes	Yes[a]
Colorado	No	No	Yes	Yes
Connecticut	Yes	No	Yes	Yes
Delaware	No	Yes	Yes	Yes
District of Columbia	Yes	No	No	Yes
Florida	No	Yes	Yes	No[b]
Georgia	No	No	Yes	Yes
Hawaii	No	No	No	No
Idaho	No	Yes	No	Yes
Illinois	No	No	No	?
Indiana	No	Yes[a]	Yes	Yes
Iowa	Yes	No	No	Yes
Kansas	No	Yes	No	No
Kentucky	No	No	No	No
Louisiana	Yes	Yes	Yes	Yes
Maine	No	No	Yes	No
Maryland	Yes	Yes[a]	No	Yes
Massachusetts	No	No	No	Yes
Michigan	No	Yes[a]	No	Yes
Minnesota	No	Yes	Yes	Yes
Mississippi	No	No	No	Yes
Missouri	Yes	No	No	Yes
Montana	No	Yes[a]	No	Yes
Nebraska	Yes	No	No	No

State	Crack Cocaine/ Powder Cocaine Distinction	Guidelines System	Determinate Sentencing	Mandatory Minimums
Nevada	No	No	No	Yes
New Hampshire	No	No	Yes	No
New Jersey	No	No	No	No
New Mexico	No	No	Yes	No
New York	No[c]	No	No	No
North Carolina	No	Yes	No	Yes
North Dakota	Yes	No	Yes	Yes
Ohio	No	No[d]	No	Yes
Oklahoma	Yes	No	No	Yes
Oregon	No	Yes	Yes	No
Pennsylvania	No	Yes	Yes	Yes
Puerto Rico	No	No	Yes	No
Rhode Island	No	Yes[e]	No	No
South Carolina	Yes	No	No	Yes
South Dakota	No	No	No	Yes
Tennessee	No	Yes	Yes	No
Texas	No	No	No	No
Utah	No	Yes	No	No
Vermont	No	No	No	No
Virgin Islands	No	No	No	Yes
Virginia	Yes	Yes[c]	No	Yes
Washington	No	Yes	Yes	No
West Virginia	No	Yes[c]	No	Yes
Wisconsin	Yes	Yes	No	Yes
Wyoming	No	No	No	No
Total Yes Responses	**14**	**21**	**20**	**32**

[a] Repealed February 1993
[b] Repealed 1993
[c] Advisory guidelines
[d] Bill pending in legislature creating guidelines
[e] In 1988, the quantities for felony possession of cocaine were lowered to account for crack; however, there is no distinction in the law based on the crack form.

Table 5

DRUG TRAFFICKING SENTENCING BY FEDERAL DISTRICT*
(October 1, 1992 through September 30, 1993)

CIRCUIT	TOTAL	Powder Cocaine		Crack Cocaine		Heroin		Marijuana		Methamphetamine	
District	Number	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	**14,297**	**5,296**	**37.0**	**3,109**	**21.8**	**1,386**	**9.7**	**3,849**	**26.9**	**657**	**4.6**
D.C. CIRCUIT	**179**	**11**	**6.2**	**160**	**89.4**	**7**	**3.9**	**1**	**0.6**	**0**	**0.0**
District of Columbia	179	11	6.2	160	89.4	7	3.9	1	0.6	0	0.0
FIRST CIRCUIT	**365**	**226**	**61.9**	**16**	**4.4**	**46**	**12.6**	**62**	**17.0**	**15**	**4.1**
Maine	44	22	50.0	5	11.4	4	9.1	13	29.5	0	0.0
Massachusetts	64	34	53.1	8	12.5	6	9.4	14	21.9	2	3.1
New Hampshire	37	6	16.2	0	0.0	0	0.0	18	48.7	13	35.1
Puerto Rico	160	119	74.4	2	1.3	26	16.2	13	8.1	0	0.0
Rhode Island	60	45	75.0	1	1.7	10	16.7	4	6.6	0	0.0
SECOND CIRCUIT	**1,233**	**521**	**42.3**	**94**	**7.6**	**512**	**41.5**	**85**	**6.9**	**21**	**1.7**
Connecticut	57	42	73.7	4	7.0	7	12.3	4	7.0	0	0.0
New York	1,117	441	39.5	89	8.0	502	44.9	65	5.8	20	1.8
Eastern	613	175	28.6	24	3.9	404	65.9	10	1.6	0	0.0
Northern	109	59	54.1	2	1.8	6	5.5	22	20.2	20	18.4
Southern	280	136	48.6	52	18.6	84	30.0	8	2.8	0	0.0
Western	115	71	61.7	11	9.6	8	7.0	25	21.7	0	0.0
Vermont	59	38	64.4	1	1.7	3	5.1	16	27.1	1	1.7
THIRD CIRCUIT	**879**	**428**	**48.7**	**213**	**24.2**	**120**	**13.7**	**66**	**7.5**	**72**	**8.2**
Delaware	26	9	34.6	17	65.4	0	0.0	0	0.0	0	0.0
New Jersey	115	65	56.5	6	5.2	39	33.9	0	0.0	5	4.4
Pennsylvania	696	340	48.9	182	26.2	80	11.5	47	6.8	67	9.6
Eastern	466	219	47.0	132	28.3	40	8.6	17	3.7	58	12.5
Middle	117	68	58.1	12	10.3	22	18.8	26	22.2	9	7.7
Western	113	53	46.9	38	33.6	18	15.9	4	3.5	0	0.0
Virgin Islands	42	14	33.3	8	19.1	1	2.4	19	45.2	0	0.0
FOURTH CIRCUIT	**1,744**	**663**	**38.0**	**706**	**40.5**	**94**	**5.4**	**258**	**14.8**	**23**	**1.3**
Maryland	73	23	31.5	16	21.9	33	45.2	0	0.0	1	1.4
North Carolina	663	321	48.4	244	36.8	12	1.8	85	12.8	1	0.2
Eastern	203	83	40.9	96	47.3	1	0.5	23	11.3	0	0.0
Middle	179	56	31.3	102	57.0	8	4.5	13	7.3	0	0.0
Western	281	182	64.8	46	16.4	3	1.1	49	17.4	1	0.4
South Carolina	338	115	34.0	118	34.9	20	5.9	73	21.6	12	3.6
Virginia	366	131	35.8	158	43.2	24	6.6	50	13.7	3	0.8
Eastern	235	68	28.9	114	48.5	24	10.2	27	11.5	2	0.9
Western	131	63	48.1	44	33.6	0	0.0	23	17.6	1	0.8
West Virginia	304	73	24.0	170	55.9	5	1.6	50	16.5	6	2.0
Northern	101	32	31.7	57	56.4	0	0.0	12	11.9	0	0.0
Southern	203	41	20.2	113	55.7	5	2.5	38	18.7	6	3.0

CIRCUIT	TOTAL	Powder Cocaine		Crack Cocaine		Heroin		Marijuana		Methamphetamine	
District	Number	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
FIFTH CIRCUIT	**2,251**	**627**	**27.9**	**394**	**17.5**	**181**	**8.0**	**1,045**	**46.4**	**37**	**1.6**
Louisiana	260	107	41.2	85	32.7	5	1.9	62	23.9	4	1.5
Eastern	158	81	51.3	52	32.9	5	3.2	22	13.9	1	0.6
Middle	29	15	51.7	12	41.4	0	0.0	2	6.9	0	0.0
Western	73	11	15.1	21	28.8	0	0.0	38	52.1	3	4.1
Mississippi	178	58	32.6	75	42.1	0	0.0	41	23.0	4	2.3
Northern	58	21	36.2	21	36.2	0	0.0	16	27.6	0	0.0
Southern	120	37	30.8	54	45.0	0	0.0	25	20.8	4	3.3
Texas	1,813	462	25.5	234	12.9	176	9.7	942	52.0	29	1.6
Eastern	126	30	23.8	53	42.1	0	0.0	37	29.4	6	4.8
Northern	253	94	37.2	47	18.6	47	18.6	57	22.5	8	3.2
Southern	702	176	25.1	59	8.4	80	11.4	417	59.4	0	0.0
Western	732	162	22.1	75	10.3	49	6.7	431	58.9	15	2.1
SIXTH CIRCUIT	**1,171**	**487**	**41.6**	**294**	**25.1**	**48**	**4.1**	**356**	**30.4**	**16**	**1.4**
Kentucky	156	77	49.4	5	3.2	1	0.6	96	61.5	7	4.5
Eastern	114	59	51.8	1	0.9	1	0.9	83	72.8	0	0.0
Western	42	18	42.9	4	9.5	0	0.0	13	31.0	7	16.7
Michigan	365	136	37.3	92	25.2	33	9.0	101	27.7	3	0.8
Eastern	312	123	39.4	87	27.9	33	10.6	68	21.8	1	0.3
Western	53	13	24.5	5	9.4	0	0.0	33	62.3	2	3.8
Ohio	320	128	40.0	106	33.1	10	3.1	74	23.1	2	0.6
Northern	136	73	53.7	31	22.8	2	1.5	28	20.6	2	1.5
Southern	184	55	29.9	75	40.8	8	4.4	46	25.0	0	0.0
Tennessee	330	146	44.2	91	27.6	4	1.2	85	25.8	4	1.2
Eastern	132	43	32.6	28	21.2	0	0.0	59	44.7	2	1.5
Middle	31	18	58.1	3	9.7	1	3.2	9	29.0	0	0.0
Western	167	85	50.9	60	35.9	3	1.8	17	10.2	2	1.2
SEVENTH CIRCUIT	**668**	**361**	**54.0**	**142**	**21.3**	**40**	**6.0**	**124**	**18.6**	**1**	**0.2**
Illinois	391	191	48.9	115	29.4	23	5.9	61	15.6	1	0.3
Central	101	40	39.6	40	39.6	3	3.0	17	16.8	1	1.0
Northern	134	103	76.9	6	4.5	20	14.9	5	3.7	0	0.0
Southern	156	48	30.8	69	44.2	0	0.0	39	25.0	0	0.0
Indiana	100	44	44.0	14	14.0	14	14.0	28	28.0	0	0.0
Northern	44	19	43.2	5	11.4	10	22.7	10	22.7	0	0.0
Southern	56	25	44.6	9	16.1	4	7.1	18	32.1	0	0.0
Wisconsin	177	126	71.2	13	7.3	3	1.7	35	19.8	0	0.0
Eastern	121	104	86.0	0	0.0	3	2.5	14	11.6	0	0.0
Western	56	22	39.3	13	23.2	0	0.0	21	37.5	0	0.0
EIGHTH CIRCUIT	**807**	**286**	**35.4**	**209**	**25.9**	**26**	**3.2**	**179**	**22.2**	**107**	**13.3**
Arkansas	76	15	19.7	25	32.9	0	0.0	25	32.9	11	14.5
Eastern	57	11	19.3	23	40.4	0	0.0	14	24.6	9	15.8
Western	19	4	21.1	2	10.5	0	0.0	11	57.9	2	10.5
Iowa	115	20	17.4	20	17.4	0	0.0	25	21.7	50	43.5
Northern	59	14	23.7	12	20.3	0	0.0	11	18.6	22	37.3
Southern	56	6	10.7	8	14.3	0	0.0	14	25.0	28	50.0
Minnesota	134	46	34.3	36	26.9	13	9.7	31	23.1	8	6.0
Missouri	331	146	44.1	97	29.3	9	2.7	46	13.9	33	10.0
Eastern	106	44	41.5	31	29.3	5	4.7	17	16.0	9	8.5
Western	225	102	45.3	66	29.3	4	1.8	29	12.9	24	10.7
Nebraska	96	35	36.5	29	30.2	2	2.1	27	28.1	3	3.1
North Dakota	22	10	45.5	0	0.0	2	9.1	9	40.9	1	4.6
South Dakota	33	14	42.4	2	6.1	0	0.0	16	48.5	1	3.0

CIRCUIT	TOTAL	Powder Cocaine		Crack Cocaine		Heroin		Marijuana		Methamphetamine	
District	Number	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
NINTH CIRCUIT	**1,882**	**492**	**26.1**	**158**	**8.4**	**126**	**6.7**	**844**	**44.9**	**262**	**13.9**
Alaska	15	7	46.7	4	26.7	0	0.0	4	26.7	0	0.0
Arizona	535	85	15.9	1	0.2	23	4.3	417	77.9	9	1.7
California	757	198	26.2	60	7.9	69	9.1	261	34.5	169	22.3
Central	71	34	47.9	8	11.3	10	14.1	5	7.0	14	19.7
Eastern	124	14	11.3	31	25.0	10	8.1	12	9.7	57	46.0
Northern	45	25	55.6	0	0.0	9	20.0	1	2.2	10	22.2
Southern	517	125	24.2	21	4.1	40	7.7	243	47.0	88	17.0
Guam	22	6	27.3	0	0.0	0	0.0	2	9.1	14	63.6
Hawaii	46	23	50.0	0	0.0	2	4.4	5	10.9	16	34.8
Idaho	19	8	42.1	0	0.0	0	0.0	6	31.6	5	26.3
Montana	51	13	25.5	0	0.0	0	0.0	30	58.8	8	15.7
Nevada	89	46	51.7	20	22.5	5	5.6	13	14.6	5	5.6
N. Mariana Islands	0	0	0	0	0	0	0	0	0	0	0
Oregon	176	42	23.9	40	22.7	21	11.9	53	30.1	20	11.4
Washington	172	64	37.2	33	19.2	6	3.5	53	30.8	16	9.3
Eastern	70	22	31.4	14	20.0	0	0.0	27	38.6	7	10.0
Western	102	42	41.2	19	18.6	6	5.9	26	25.5	9	8.8
TENTH CIRCUIT	**789**	**239**	**30.3**	**113**	**14.3**	**18**	**2.3**	**370**	**46.9**	**49**	**6.2**
Colorado	152	78	51.3	35	23.0	6	4.0	26	17.1	7	4.6
Kansas	89	28	31.5	25	28.1	1	1.1	29	32.6	6	6.7
New Mexico	306	38	12.4	1	0.3	2	0.7	260	85.0	5	1.6
Oklahoma	128	35	27.3	48	37.5	4	3.1	29	22.7	12	9.4
Eastern	4	1	25.0	0	0.0	0	0.0	2	50.0	1	25.0
Northern	35	6	17.1	25	71.4	0	0.0	3	8.6	1	2.9
Western	89	28	31.5	23	25.8	4	4.5	24	27.0	10	11.2
Utah	75	52	69.3	2	2.7	5	6.7	11	14.7	5	6.7
Wyoming	39	8	20.5	2	5.1	0	0.0	15	38.5	14	35.9
ELEVENTH CIRCUIT	**2,329**	**985**	**42.3**	**640**	**27.5**	**191**	**8.2**	**459**	**19.7**	**54**	**2.3**
Alabama	348	95	27.3	153	44.0	1	0.3	88	25.3	11	3.2
Middle	65	22	33.9	20	30.8	0	0.0	23	35.4	0	0.0
Northern	75	27	36.0	18	24.0	0	0.0	25	33.3	5	6.7
Southern	208	46	22.1	115	55.3	1	0.5	40	19.2	6	2.9
Florida	1,596	785	49.2	339	21.2	170	10.7	275	17.2	27	1.7
Middle	568	196	34.5	200	35.2	6	1.1	142	25.0	24	4.2
Northern	198	54	27.3	85	42.9	2	1.0	55	27.8	2	1.0
Southern	830	535	64.5	54	6.5	162	19.5	78	9.4	1	0.1
Georgia	385	105	27.3	148	38.4	20	5.2	96	24.9	16	4.2
Middle	76	16	21.1	51	67.1	0	0.0	9	11.8	0	0.0
Northern	214	67	31.3	60	28.0	20	9.4	51	23.8	16	7.5
Southern	95	22	23.2	37	39.0	0	0.0	36	37.9	0	0.0

*Of the 42,107 guideline cases, 19,475 involved drugs. Of these 19,475 cases, 5,178 cases were excluded for one or more of the following reasons: incomplete guideline application information (3,283); missing drug type (33); cases in which the drug type is other than the five primary drugs listed (987); drug convictions which did not represent the primary offense (2,382).

SOURCE: U.S. Sentencing Commission, 1993 Data File, MONFY93.

CHAPTER VII: SENTENCING OF COCAINE OFFENDERS

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* * *

3. Race and Ethnicity

Table 13 presents the distribution of drug trafficking cases by defendant's race. In 1993, Whites account for 30.8 percent of all convicted federal drug offenders, Blacks 33.9 percent, and Hispanics 33.8 percent. Sentencing patterns for some drugs show high concentrations of a particular racial or ethnic group. Most strikingly, crack cocaine offenders are 88.3 percent Black. Conversely, methamphetamine offenders are 84.2 percent White. Powder cocaine cases involve sizeable proportions of Whites (32.0%), Blacks (27.4%), and Hispanics (39.3%).

Among defendants convicted of simple possession, 58 percent of powder defendants were White, 26.7 percent were Black, and 15 percent were Hispanic. Among crack defendants, 10.3 percent were White, 84.5 percent were Black, and 5.2 percent were Hispanic.

* * *

Table 13

RACE OF DRUG TRAFFICKING DEFENDANTS*
(October 1, 1992 through September 30, 1993)

	TOTAL		WHITE			BLACK			HISPANIC**			OTHER**		
DRUG TYPE	Number	Percent	Number	Percent of Race	Percent of Drug	Number	Percent of Race	Percent of Drug	Number	Percent of Race	Percent of Drug	Number	Percent of Race	Percent of Drug
TOTAL	14,293	100.0	4,403	30.8	--	4,843	33.9	--	4,826	33.8	--	221	1.5	--
Powder Cocaine	5,296	37.0	1,694	38.5	32.0	1,452	30.0	27.4	2,079	43.1	39.3	71	32.1	1.3
Crack Cocaine	3,109	21.8	128	2.9	4.1	2,745	56.7	88.3	221	4.6	7.1	15	6.8	.5
Heroin	1,384	9.7	173	3.9	12.5	487	10.1	35.1	676	14.0	48.8	48	21.7	3.5
Marijuana	2,848	26.9	1,855	42.1	48.2	149	3.1	3.9	1,794	37.2	16.6	50	22.6	1.3
Methamphetamine	656	4.6	553	12.6	84.2	10	0.2	1.5	56	1.2	8.5	37	16.7	5.6

*Of the 42,107 guideline cases, 19,475 involved drugs. Of these 19,475 cases, 5,182 cases were excluded for one or more of the following reasons: incomplete guideline application information (3,283); missing drug type (33), cases in which the drug type is other than the five primary drugs listed (987); drug convictions in which the primary drug guideline applied was not §2D1.1 (2,382); or missing information on defendant's race (4).

**For purposes of this report, defendants whose ethnic background is designated as Hispanic are shown as Hispanic regardless of racial background. The Other category includes defendants of Native American, Alaskan Native, and Asian or Pacific Islander origin.

SOURCE: U.S. Sentencing Commission, 1993 Datafile, MONFY93.

4. The Effect of the 100-to-1 Quantity Ratio on Differences in Average Sentences Imposed on Various Racial Groups

Findings in a recent Bureau of Justice Statistics study, conducted by Douglas McDonald and Kenneth Carlson, suggest that between 1986 and 1990 both the rate and the average length of imprisonment for federal offenders increased for Blacks in comparison to Whites.[28] The researchers concluded that this increase, based on legally relevant offense characteristics, was caused largely by the mandatory minimum penalties for drug offenses and more specifically by the 100-to-1 quantity ratio of powder cocaine to crack cocaine. The study states that with the implementation of sentencing guidelines and mandatory minimum penalties,

> [t]he main reason that Blacks' sentences were longer than Whites' during the period from January 1989 to June 1990 was that 83% of all Federal offenders convicted of trafficking in crack cocaine in guideline cases were Black, and the average sentence imposed for crack trafficking was twice as long as for trafficking in powdered cocaine.[29]

McDonald and Carlson examined a number of offense- and offender-related characteristics and found that White, Black, and Hispanic crack cocaine traffickers

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[28] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter?* (Nov. 1993).

[29] *Id.* at 1.

differed in drug amounts, prior record, weapon involvement, trial rates, and charge reductions resulting from pleas. They conclude that within the category of crack cocaine trafficking, "these differences accounted for all the observed variation in imprisonment sentences."[30]

Interpreting their findings, McDonald and Carlson suggest that "[m]odification of specific laws and/or guidelines would essentially eliminate the racial/ethnic differences . . . "[31] More specifically, they single out the 100-to-1 quantity ratio and argue that

> [i]f legislation and guidelines were changed so that crack and powdered cocaine traffickers were sentenced identically for the same weight of cocaine, this study's analysis suggests that the Black/White difference in sentences for cocaine trafficking would not only evaporate but would slightly reverse.[32]

The 100-to-1 crack cocaine to powder cocaine quantity ratio is primary cause of the growing disparity between sentences for Black and White federal defendants.

* * *

1. The Guideline Role Adjustment

The sentencing guidelines adjust for a defendant's role in the offense, increasing the sentence for organizers,

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[30] *Id.* at 2.

[31] *Id.* at 1.

[32] *Id.* at 2.

leaders, managers, or supervisors and decreasing it for those with minor roles. Most drug trafficking defendants (73.5%) receive no aggravating or mitigating role adjustment at sentencing. The mitigating role adjustment is granted least often for crack cocaine defendants (8.7%), while approximately ten percent of defendants receive an aggravating role adjustment regardless of the drug type.

The guideline role adjustment is not intended to measure a defendant's function within a drug trafficking organization or a defendant's culpability relative to the entire drug distribution system. This is because the adjustment is made relative to the scope of trafficking that the defendant is held accountable for under the relevant conduct guideline. For example, a retail street dealer at the bottom of a multi-state trafficking organization would not necessarily be granted an adjustment for minor role if he/she was indicted alone and was held accountable only for the drugs he/she personally sold. For this particular offense, the defendant was not a minimal or minor participant.

* * *

Table 18

DEFENDANT'S FUNCTION* IN DRUG TRAFFICKING OPERATION**
– 1992 Drug Sample –

	Total		Powder Cocaine		Crack Cocaine		Heroin		Marijuana		Methamphetamine	
Function	n	%	n	%	n	%	n	%	n	%	n	%
TOTAL	**618**	**100.0**	**173**	**28.0**	**146**	**23.6**	**105**	**17.0**	**132**	**21.4**	**62**	**10.0**
High-Level Dealer	**69**	11.2	16	9.2	8	5.5	10	9.5	21	15.9	14	22.6
Mid-Level Dealer/Broker	**208**	33.7	66	38.2	45	30.8	20	19.0	44	33.3	33	53.2
Street-Level Dealer/Bodyguard	**191**	30.9	54	31.2	87	59.6	25	23.8	12	9.1	13	21.0
Courier/Mule	**150**	24.3	37	21.4	6	4.1	50	47.6	55	41.7	2	3.2

*If a defendant had more than one function, the most serious function was used. If the defendant was held accountable for more than one drug type in the instant offense, the drug that produced the highest base offense level was the primary drug type used.

**Of the 840 defendants in the sample, 222 were excluded due to one or more of the following conditions: not a §2D1.1 drug cases (73); drug involved was LSD (59); the defendant's function was not one of the functions listed above (79); or the defendant's function in the instant offense could not be determined (12).

SOURCE: Stratified random sample of 1992 drug cases, U.S. Sentencing Commission, 1992 Data File, MONFY92.

Table 19

STREET-LEVEL VALUE OF DRUG QUANTITY BY DRUG TYPE AND BASE OFFENSE LEVEL*

BASE OFFENSE LEVEL/QUANTITY	Powder Cocaine ($107/gram)	Crack Cocaine ($38.33/⅓ gram)	Heroin ($10/10 mg)	Marijuana ($237.57/ounce)	Methamphetamine ($95/gram)
Level 12	--	--	--	$20,950	--
Level 14	$2,675	$29	$5,000	$41,900	$475
Level 16	$5,350	$58	$10,000	$83,800	$950
Level 18	$10,700	$115	$20,000	$167,600	$1,900
Level 20	$21,400	$230	$40,000	$335,200	$3,800
Level 22	$32,100	$345	$60,000	$502,800	$5,700
Level 24	$42,800	$460	$80,000	$670,400	$7,600
Level 26	$53,500	$575	$100,000	$838,000	$9,500
Level 28	$214,000	$2,300	$400,000	$3,352,000	$38,000
Level 30	$374,500	$4,025	$700,000	$5,866,000	$66,500
Level 32	$535,000	$5,750	$1,000,000	$8,380,000	$95,000
Level 34	$1,605,000	$17,250	$3,000,000	$25,140,000	$285,000
Level 36	$5,350,000	$57,500	$10,000,000	$83,800,000	$950,000
Level 38	$16,050,000	$172,500	$30,000,000	$251,400,000	$2,850,000

*Street-level value is derived from the U.S. Drug Enforcement Administration's Illegal Price and Purity Report, United States: January 1990-December 1993, April 1994 and U.S. Drug Threat Assessment: 1993, September 1993. The DEA reports the price paid for kilograms, pounds, ounces, and grams. Because the DEA reports a range of prices for each drug, the midpoint was chosen for this analysis. Further, the price range chosen was that typically associated with retail sale, *e.g.*, for cocaine powder the price per gram was selected whereas for marijuana the price per ounce was selected.

4. Flattening and Inversion of Penalties

Crack's unique distribution pattern, in combination with the 100-to-1 quantity ratio, can lead to anomalous results in which retail crack dealers get longer sentences than the wholesale drug distributors who supply them the powder cocaine from which their crack is produced. The following example from a recent federal case illustrates this sentencing anomaly:

> Two defendants purchased approximately 255 grams of powder cocaine from their supplier, returned home, and "cooked" the powder cocaine, producing approximately 88 grams of crack cocaine. Unhappy with the amount of crack produced (typically the yield would [sic] been about 200 grams), the defendants called their supplier and complained. The supplier agreed to replace the 255 grams of powder cocaine at no additional cost. The defendants returned to their supplier with the 88 grams of crack in their possession and were arrested prior to completing the transaction.
>
> At sentencing, the supplier's guideline sentencing range (a first-time offender) for selling the 255 grams of powder is 33 to 41 months' imprisonment; the range for the defendants (also first-time offenders) who bought a portion of the suppliers' powder and cooked it is 121 to 151 months. In addition, the two crack defendants are subject to a mandatory minimum penalty of ten years, while the supplier who sold

them the powder cocaine is subject to no statutory minimum penalty.[38]

This case, while extreme in its details, is not atypical of the inversion of penalties between high- and low-level distributors caused by the 100-to-1 quantity ratio.

* * *

CHAPTER VIII: FINDINGS, DISCUSSION AND RECOMMENDATIONS

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* * *

C. SUMMARY

As discussed above, a review of the relatively sparse empirical evidence available concerning those factors Congress considered in distinguishing crack from powder cocaine leads to mixed conclusions and few clear answers. Nevertheless, the Commission concludes that a policymaker could infer that crack cocaine poses greater harms to society than does powder cocaine. For example, because smoking crack cocaine lends itself to binge use in a way not found with snorting powder – the most popular way of administering that form of the drug – crack has a greater potential for creating dependency. Moreover, the ease by which crack can be administered and its ability to be marketed cheaply have made it particularly

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[38] U.S. Sentencing Commission, Hotline Database, (Nov. 1994).

appealing and accessible to a broader population, including some of the most vulnerable members of society: the poor and the young. Further, both forms of cocaine appear to be associated with systemic violence, that is, violence associated with the marketing of a drug; however, crack dealers generally, tend to have a stronger association with systemic violence and are more likely to possess weapons than powder cocaine dealers. Finally, crack dealers, generally, have more extensive criminal records than other drug dealers, and they tend to use young people to distribute the drug at an increased rate.

A conclusion that crack cocaine poses somewhat greater harm to society, however, does not answer the question whether the 100-to-1 quantity ratio between powder and crack cocaine is one that this Commission would recommend. In addressing that question, the Commission notes that there is no precise method by which one can determine the optimal penalty differential between drugs or even between kinds of offenses. While medical and pharmacological research can calibrate closely the appropriate amount of medication necessary to treat an illness, there is no comparable test to identify the appropriate punishment level for the illegal sale of a controlled substance. Instead, in establishing a penalty level for trafficking in a particular drug, the policymaker must weigh pharmacological evidence and the other societal harms posed by the substance to arrive at a sound penalty level.

Accordingly, even while agreeing that crack may be more harmful than powder cocaine, the Commission is not prepared at this time to say definitely how that additional harm should be accounted for within the current

penalty scheme. Indeed, for reasons discussed below, the Commission will not recommend in this report a particular ratio or ratios or a particular structure that it can endorse. Nevertheless, the Commission firmly concludes that it cannot recommend a ratio differential as great as the current 100-to-1 quantity ratio.

Several factors lead the Commission to a conclusion that a 100-to-1 differential cannot be recommended. First, when Congress established the quantity ratio in 1986, there were no sentencing guidelines; rather, the guidelines took effect in 1987 and were not fully implemented until 1989. Accordingly, Congress had only the possibility of an enhanced ratio to look to in capturing, in a sentencing structure, the additional harms that legislators felt inhered in crack cocaine. Therefore, to the extent that the guidelines now provide a punishment for some of those same factors subsumed in the ratio, those factors generate an enhancement both through an increased ratio differential and through guideline adjustments. In short, they are doubly punished through the interplay of the two structures.

Accordingly, if Congress believed that certain factors warranted a 100-to-1 quantity ratio and if the subsequently adopted guidelines provided a punishment for some of those factors, then, as a logical matter, the ratio should be lowered by an amount commensurate with the extent to which these factors are addressed by the guidelines. For example, Congress was concerned greatly about the increase in crime, and particularly the increase in violent crime, resulting from the trafficking and use of crack cocaine. Some factors, however, such as the more addictive nature of crack, clearly are not addressed by the

guidelines. Other factors, such as a tendency toward increased violence associated with crack distribution, are addressed, at least in part.

Specifically, the likelihood of violence in connection with the trafficking of a drug is increased greatly if those trafficking in that drug carry guns or have prior criminal records. Certainly the harm of the crime is greater if someone is killed. The guidelines can provide an enhancement for each of these factors. That is, a defendant who carries a firearm or is involved in a drug conspiracy in which another participant carries a firearm will receive an enhancement for possession of that firearm. In addition, the punishment of a defendant who has a prior record is increased in proportion to the extensiveness of that record. Further, if in relation to the crack distribution a victim is killed, the guidelines typically provide a life sentence and, because there is no parole in the federal system, a life sentence means life in prison.

Although the guidelines provide punishment for some of the factors that led Congress to establish the 100-to-1 quantity ratio, the guidelines do not address all of the factors that concerned Congress. For example, no provision of the guidelines accounts for the increased addictiveness of crack or its increased attraction as a result of its cheap marketability to a broader and more vulnerable part of the population. Neither do the guidelines address completely all aspects of the relationship between crack and crime associated with crack distribution or other social consequences. Thus, concerns about unnecessarily duplicative punishment between the more finely calibrated sentencing guidelines and the broader brush 100-to-1 quantity ratio explain, but only partially,

the Commission's conclusion that the 100-to-1 quantity ratio should be reconsidered.

Another central basis for the Commission's rejection of this ratio is the extreme anomalies in sentencing produced by such a high differential in penalties between two easily convertible forms of the same drug. Crack cocaine is made through a simple conversion process applied to powder cocaine. Thus, those who traffic in crack necessarily have obtained the "raw material" for their drug through the powder cocaine distribution chain. One premise of the mandatory minimum sentencing structure is that, all other things being equal, a drug dealer's danger to society is in direct proportion to the quantity of the drug in which he/she deals. Yet, as a result of the ratio differential, a large scale powder cocaine dealer who trafficks in 500 grams (2,500-5,000 dosage units) of powder cocaine will receive the same sentence as a crack dealer who has sold only 5 grams (10-25 doses) of crack cocaine, that is, a five-year sentence of imprisonment.

Such a vast difference in the quantity of drug necessary to trigger the same sentence would be acceptable if the threat of increased dangers and harms created by crack versus powder cocaine appeared commensurate. Yet, even though crack is arguably more addictive than powder, when the latter is only snorted, the Commission cannot say that the increased likelihood of dependency or binge use posed by crack is commensurate with a ratio differential as great as 100-to-1.

Similarly, although evidence suggests that the trafficking and use of crack cocaine have engendered more

violence associated with marketing the drug than has powder cocaine, the evidence does not indicate that the increased level of violence and crime justifies a ratio as large as 100-to-1. Moreover, to the extent that some members of Congress expressed concern in 1986 that use of crack tends to alter a person's behavior in such a way as to cause that person to commit a crime (psychopharmacologically induced crime), the evidence does not suggest any greater association for crack than for powder cocaine with that type of criminal activity.

For all of these reasons, the Commission concludes that the 100-to-1 quantity ratio that presently drives sentencing policy for cocaine trafficking offenses should be re-examined and revised.

In the Commission's view, the considerations described above suggesting a need for reexamination of the 100-to-1 quantity ratio underlying cocaine trafficking penalties similarly warrant congressional reconsideration of the dramatic distinction in simple possession penalties for crack versus powder cocaine and other drugs. A number of other concerns also point to the need to modify this policy.

First, focusing on the difficult problem of user/ possessors, there appears to be an insufficient basis for punishing heavy crack users who possess a measurable fraction over five grams (10 to 50 doses, at .1 to .5 gram/ dose) by a mandatory *minimum* term of imprisonment (five years) that is five times the *maximum* imposable sentence (one year) for simple possession of a similar or greater quantity of any other drug. In general, the unique approach to emphasizing severe punishment of those

who possess crack for personal consumption is at odds with the prevailing, treatment-oriented approach prescribed by Congress for other drug users/possessors.

Secondly, the crack simple possession penalties have created sentencing anomalies and unwarranted disparities in the treatment of essentially similar defendants, results that conflict with the fundamental purposes of the Sentencing Reform Act. In particular, the sentencing "cliff" between a first offender who simply possesses as much as 5.0 grams of crack (or any quantity of any other drug) and an otherwise similarly situated defendant having a minutely measurable greater quantity (*e.g.*, 5.01 gram) of crack – statutory maximum sentence of one year's imprisonment for the former, minimum sentence of five years' imprisonment for the latter – creates a wide disparity and disproportionality that the sentencing guidelines cannot rectify. And, for repeat possessors of small quantities of crack (greater than three grams but less than five grams for a first repeater, greater than one gram but less than five grams for a second repeater), the unusual statutory scheme creates the anomalous result of the defendant faring better if convicted and sentenced as a trafficker (ordinarily the more serious offense) than if sentenced under the simple possession statute.

D. RECOMMENDATIONS

The Commission strongly recommends against a 100-to-1 quantity ratio. Having said that, the Commission is not prepared in this report to recommend a *specific* different ratio or a *specific* different structural approach to deal with the enhanced dangers believed to be presented by

crack. Rather, as a priority matter, the Commission intends to develop a model or models for Congress to consider in determining whether to revise the current approach that it takes in the sentencing of crack offenses.

At the outset, the Commission will focus on a model that maximizes the development of offense- and offender-specific guideline enhancements addressing as many of the discrete, substantial harms associated with crack offenses as reasonably can be handled in a guideline system. For example, Congress is rightly concerned with the use of juveniles in distributing crack and the growing problem of cocaine-exposed babies. To address these concerns relating to some but not all crack distribution offenses, the Commission will investigate the feasibility of a guideline enhancement that additionally punishes those who engage youth to distribute drugs and an enhancement for those who sell crack to pregnant women. Currently, an offender does not receive enhancement for these acts unless the government charges the specific act and a conviction results.

Further, Congress accurately expresses concern with the violence associated with crack distribution. The Commission will examine more effective means of incorporating appropriate enhancements for that violence into the guidelines. In addition to the currently available enhancements for weapons and prior criminal record, the Commission might add enhancements for type of weapon, discharge of weapon, injury to victims, bystander injury, and crack houses or shooting galleries.

In comparison to a penalty scheme that relies exclusively or primarily on a quantity ratio to distinguish

among offenders warranting greater punishment, this approach is distinctly fairer and more consistent with the more uniform but appropriately individualized sentencing approach Congress envisioned under the Sentencing Reform Act. To illustrate using the youth as distributor phenomenon, consider that, to the extent that a ratio is used as the principal means of meting out greater punishment for crack offenses and that ratio is increased to punish those who engage youth to distribute crack, such an enhancement also has the undesirable effect of over-punishing the defendant who may have never been involved in such a venture. In contrast, a well-crafted guideline provision that is focused specifically on the particular harm of engaging youth to distribute crack will additionally punish only those who have created that identified harm.

Following this approach, the Commission will attempt to identify all such harms frequently and substantially associated with crack offenses and seek to determine the extent to which they can be addressed in a guideline system. More specifically, the Commission will consider, to the extent relevant to congressional concern and the purposes of sentencing as set forth at 18 U.S.C. § 3553(a)(2), the following: 1) the form of cocaine involved; 2) whether a firearm or other dangerous weapon was involved; 3) whether the offense resulted in serious bodily injury or death to another person; 4) the quantity of cocaine involved; 5) the extent to which the powder cocaine defendant knew the drug would be converted into crack; 6) the extent to which the offense involved systemic crime, that is, crime related to the drug's marketing, distribution, and control; 7) the extent

to which the offense involved social harms, that is, harms associated with increased addictiveness, parental neglect, child and domestic abuse, and high risk sexual behaviors; 8) whether the offense involved the use or employment of any person under the age of 18; 9) whether the defendant performed a managerial or leadership role in the offense; 10) the defendant's prior criminal record; and 11) any other aggravating or mitigating factors necessary to ensure adequate and appropriate punishment for defendants convicted of cocaine offenses.

The Commission is aware that there may well be some harms that are inherent in the drug itself and that, as a practical matter, are not addressable through this type of specifically tailored guideline provision. For example, to the extent that crack is more addictive than powder cocaine, that concern may be addressable only through an enhanced ratio or penalty differential. Indeed, Congress has recognized, and appropriately so, that some drugs simply are more harmful than others, and it has accounted for those differences by establishing a different ratio or different quantity necessary to trigger a mandatory penalty. Accordingly, if the Commission ultimately concludes that some quantity ratio between powder and crack cocaine is necessary, that differential can be reflected by establishing appropriately different guideline base offense levels for offenses involving the two drugs.

Building on a review of the guidelines for drug trafficking offenses that is already well underway, the Commission expects that it can develop and submit to Congress one or more penalty scheme models of the general form described above no later than the 1995-96

amendment cycle.[11] Congress, of course, has the prerogative to address the 100-to-1 quantity ratio applicable to cocaine trafficking offenses at any time.

The Commission further recommends that Congress revisit the penalties uniquely applicable to crack simple possession penalties. Much of the rationale for reassessing the 100-to-1 quantity ratio applicable to cocaine trafficking offenses similarly applies to the penalties uniquely applicable to crack simple possession offenses. If Congress were to address the 100-to-1 quantity ratio applicable to trafficking offenses by increasing the amount of crack equating to the five- and ten-year mandatory minimums, some conforming modification in 21 U.S.C. § 844(a) would be necessary to ensure that the lesser-included offense of simple possession of crack is not punished more severely than the more serious trafficking offense.

The Commission is fully cognizant of Congress's ultimate authority over sentencing policy. It also recognizes that approaches other than the approach suggested here could address the fundamental need for a fairer, more effective cocaine sentencing policy. This said, having broadly delegated to the Sentencing Commission responsibility for developing a comprehensive and rational system of sentencing guidelines for all offenses, Congress should consider relying on the same approach to implement appropriate policy adjustments in this specific area.

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[11] Under current law, the Commission is restricted in the timing of any submission of proposed guideline amendments to the limited timeframe between the convening of a session of Congress and May 1. *See* 28 U.S.C. § 994(p).

Among other advantages, this approach would permit the Commission, as an ongoing expert body charged with continually refining the guidelines system, greater flexibility to make adjustments reflecting advances in knowledge about cocaine and its societal problems. Most importantly, through the guidelines system, consistent, appropriately individualized, and substantially fairer sentencing results can be achieved that will effectively promote the purposes of sentencing.

Review

CRACK COCAINE AND COCAINE HYDROCHLORIDE

Are the Differences Myth or Reality?

Dorothy K. Hatsukami, PhD; Marian W. Fischman, PhD

Objective. – To review and discuss the differences and similarities between the use of crack cocaine and cocaine hydrochloride; and to determine how these findings might affect policies on the imprisonment and treatment of cocaine users.

Data Sources. – English-language publications were identified through a computerized search (using MEDLINE) between 1976 and 1996 using the search terms "smoked cocaine," "crack cocaine," "freebase," and "cocaine-base." In addition, manual searches were conducted on references cited in original research articles, reviews, and an annotated bibliography, and on selected journals.

Study Selection. – Only those articles that compared various routes of cocaine administration or types of cocaine (cocaine base or crack cocaine vs cocaine hydrochloride) were examined.

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Data Extraction. – Studies were reviewed to obtain information on the composition of the 2 forms of cocaine, and the prevalence, pharmacokinetics and pharmacodynamics, abuse liability, pattern of use, and consequences across the various routes of cocaine administration and forms of cocaine.

Conclusion. – Cocaine hydrochloride is readily converted to base prior to use. The physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of cocaine hydrochloride or crack cocaine (cocaine base). However, evidence exists showing a greater abuse liability, greater propensity for dependence, and more severe consequences when cocaine is smoked (cocaine-base) or injected intravenously (cocaine hydrochloride) compared with intranasal use (cocaine hydrochloride). The crucial variables appear to be the immediacy, duration, and magnitude of cocaine's effect, as well as the frequency and amount of cocaine used rather than the form of the cocaine. Furthermore, cocaine hydrochloride used intranasally may be a gateway drug or behavior to using crack cocaine. Based on these findings, the federal sentencing guidelines allowing possession of 100 times more cocaine hydrochloride than crack cocaine to trigger mandatory minimum penalties is deemed excessive. Although crack cocaine has been linked with crime to a greater extent than cocaine hydrochloride, many of these crimes are associated with the addiction to cocaine. Therefore, those addicted individuals who are incarcerated for the sale or possession of cocaine are better served by treatment than prison.

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FROM THE mid 1970s to the mid 1980s, the United States was in the midst of a cocaine epidemic of a very different nature than the current one. The users were primarily middle class, the drug was primarily powder cocaine hydrochloride taken by the intranasal route. A relative few dissolved the drug in water and injected in intravenously, and a relative few carried out a "gourmet" conversion to the base form in order to smoke the cocaine, using kits purchased in head shops. Results from the National Household Survey on Drug Abuse (NHSDA), [1,2] whose respondents include civilian noninstitutionalized individuals 12 years of age and older, indicated that, in 1974, 5 million people had tried cocaine, with less than 10% having used it in the past year. By 1982 more than 20 million people reported having tried cocaine, with approximately half of them using it in the past year. By 1985, the number of those ever using cocaine had increased to 25 million, and the peak of that epidemic was reached, with steadily diminishing numbers over the next 7 years. However, a new epidemic was beginning: crack cocaine, a readily smokable form of cocaine hydrochloride, was being sold in unit doses for $3 to $5 per rock. The availability of a relatively cheap smokable form led to a marked expansion of cocaine use among the poor and ethnic minorities, [2,3] and its use was accompanied by violent crime and devastation of both inner-city areas and families.

See also p 1615.

The distinction between cocaine hydrochloride and cocaine base (crack cocaine) has received a great deal of attention during the past few years, with primarily a judicial focus. In 1986, Congress passed a federal sentencing guideline that punishes a first-time offender with a minimum mandatory sentence of 5 years in prison for possessing 5 g of crack cocaine (resulting in 50-200 doses), while that same first-time offender would have to possess 500 g of cocaine hydrochloride (resulting in more than 10,000 doses) to obtain the same sentence. With unit dosing approximately the same for the 2 forms, the hydrochloride form represents approximately a 100-fold increase over the crack cocaine form in the number of cocaine doses available for use. Furthermore, in 1988 a law was passed stating that the possession of more than 5 g of crack cocaine triggers a minimum of 5 years in prison, whereas simple possession of cocaine hydrochloride or any other controlled substance by first-time offenders is punished by a maximum of 1 year in prison.

Three problems are perceived to have arisen from these discrepant sentencings. First, low-level retail crack dealers have received more severe sentences than wholesale suppliers of cocaine hydrochloride. Second, crack cocaine users who are addicted are more prone to be imprisoned than treated for their abuse. Third, this sentencing guideline has led to 22 times more convictions among African Americans than whites. For example, blacks accounted for 88%, Hispanics for 7%, and whites

for 4% of the federal crack cocaine distribution convictions in 1993; in contrast, only 27% of cocaine hydrochloride charges were accounted for by blacks, with 32% white and 39% Hispanic.[4] Furthermore, in actual numbers, fewer blacks report using crack cocaine in the past year compared with whites,[2] although an increasing proportion of blacks and Hispanics were found to comprise the frequent crack as well as cocaine hydrochloride users.[3] As a result, the issue of racial discrimination has surfaced.

In the spring of 1995, the US Sentencing Commission,[4] which establishes guidelines for the federal courts, issued a report strongly opposed to the 100:1 quantity ratio for sentencing between crack cocaine and cocaine hydrochloride. The commission reported that while a greater penalty for crack cocaine is justifiable, the 100:1 sentencing ratio exceeds the differences between the 2 forms of cocaine. The commission stated that at this time there is no substantive evidence to support this differential ratio in sentencing. Furthermore, this sentencing guideline was considered to lead to a lack of sensitivity to differences in individual factors associated with possession of cocaine and to anomalies in sentencing between 2 easily convertible forms of the same drug. The commission therefore called for more flexible sentencing that would take into account the various factors associated with cocaine use. Attorney General Janet Reno recommended that Congress reject the proposal of the commission, although she agreed that the disparity in sentencing should be narrowed but not eliminated. In the fall of 1995, the House and Senate voted to reject the commission's proposals and President Clinton was supportive of

Congress on this issue. Proponents for the discrepant sentencing point to the greater violence, gang activities, health problems, and family disruption associated with crack compared with cocaine hydrochloride as well as its greater accessibility to the young, poor, and disadvantaged. Furthermore, crack was considered to be more addictive than cocaine hydrochloride.

This article will examine the scientific evidence demonstrating the similarities and differences between crack cocaine and cocaine hydrochloride. The results from this review will show that the route of administration (eg, intranasal, intravenous, or smoked) is a more important determining factor for the abuse potential, pharmacokinetics, and biological and psychological effects of cocaine than the form of cocaine. Clearly, to some extent, form dictates route (ie, crack cocaine can only be smoked), but cocaine, regardless of whether it is crack cocaine or cocaine hydrochloride, leads to the same physiological and behavioral effects. The more appropriate comparison is between intravenous cocaine hydrochloride and smoked crack cocaine, since both are more likely to lead to abuse, dependence, and severe consequences than intranasal cocaine hydrochloride due primarily to the rate and amount of cocaine reaching the brain via these routes of administration. These results do not support the 100:1 sentencing ratio between crack cocaine and cocaine hydrochloride. Additionally, this article will conclude that it would be more cost-effective in the long term if greater effort were expended in treatment of appropriate cocaine abusers rather than imprisonment of all convicted cocaine abusers.

METHODS

Objective and Study Selection

The objective of this review is to determine similarities and differences between the use of crack cocaine and cocaine hydrochloride. Therefore, for a study to be included in the review, it had to compare the effects of crack cocaine with the effects of cocaine hydrochloride, administered either intravenously or intranasally.

Data Sources

A systematic search of MEDLINE (1976 to 1996) was conducted using the search terms "smoked cocaine," "crack cocaine," "freebase," and "cocaine-base." Names of selected authors who are known to have conducted research in this area were also searched.

Additional references were searched from the reference list of original research and review articles.

Selected publications were searched manually.

An annotated bibliography of articles on cocaine[5] was also reviewed to select any articles that pertained to comparing smoked or crack cocaine with cocaine hydrochloride.

Date Extraction

Because so few studies have been conducted comparing crack cocaine with cocaine hydrochloride, or cocaine administered across various routes, almost all studies were included in the review and consistency of the results across studies was examined . Relevant studies

were those that addressed the prevalence of use, the composition of the various types of cocaine, the pharmacokinetics and pharmacodynamics, abuse liability, and pattern of use, including rapidity and probability of developing dependence, and the consequences across the various routes of administration and forms of cocaine. Each study was reviewed and extracted for results relevant to the aforementioned areas and for conclusions. The majority of these studies were conducted in the mid to late 1980s and early 1990s.

RESULTS

Prevalence of Cocaine Use

The 1993 NHSDA report indicated that among those who used cocaine at least once in the past year, 77% snorted, 36% smoked, and 7% injected cocaine intravenously. In this population of cocaine users, 69% were white, 15% were black, and 13% were Hispanic.[2] Among those reporting crack use at least once in the previous year, 46% were white, 36% were black, and 11% were Hispanic. Within racial categories, 2.0% (n=3 153 860) of whites, 2.9% (n=663 058) of blacks, and 3.1% (n=573 531) of Hispanics reported past-year cocaine use (cocaine hydrochloride and crack), whereas 0.3% (n=473 079) of whites, 1.6% (n=743-079) of whites, 1.6% (n=368 032) of blacks, and 0.6% (n=111 006) of Hispanics reported past-year crack use. Thus, crack use is more prevalent in the African-American population, although there are fewer absolute numbers of black users compared with white users. Furthermore, if drug availability and social conditions are held constant, then the probability of crack

cocaine use within a specific population does not differ by race or ethnicity.[6] Nonetheless, in an analysis of the 1991 NHSDA, an increasing proportion of African Americans and Hispanics and those living in large metropolitan areas were found to comprise the frequent cocaine hydrochloride and crack users.[3] In addition, among frequent users compared with infrequent users, there is a greater rate of crack use (52.5% vs 17.5%, respectively) and intravenous cocaine use (24.3% vs 9.3%, respectively).

In summary, cocaine hydrochloride is the dominant form of cocaine used by the general population. among cocaine users, a higher percentage of whites use cocaine than blacks or Hispanics, with the percentage of blacks increasing when examining crack cocaine use. On the other hand, within racial groups, a higher percentage of blacks and Hispanics use crack cocaine compared with whites. However, this higher prevalence may be a function of where they live rather than racial background.

Cocaine Hydrochloride and Cocaine Base: Are They The Same Drug?

Cocaine is an alkaloid extracted from coca leaves. The coca leaves are processed with different chemicals (eg, alkali, organic solvents, hydrochloric acid, and ammonia) resulting in the intermediate product, coca paste, and the final product, cocaine hydrochloride, which is imported to the United States and other parts of the world from South America. Cocaine hydrochloride is typically used for nonmedical purposes either intranasally (snorting), or intravenously in an aqueous solution since the drug is hydrophilic. Cocaine hydrochloride

cannot be smoked because it decomposes as temperatures required to vaporize it. Cocaine base, however, can easily be smoked at temperatures significantly lower than cocaine hydrochloride, and therefore is the form of cocaine used for smoking. It is made by mixing cocaine hydrochloride with an alkaline substance, such as sodium bicarbonate or ammonia to convert it to base, and then heating. The result is waxy chunks or rocks of cocaine often referred to as crack cocaine. Once gram of cocaine hydrochloride is typically converted into 0.89 g of cocaine base or crack.[4] Crack cocaine is typically smoked in glass or other pipes, soda cans modified to accommodate the placement of crack cocaine and act as pipes, or tobacco or nontobacco cigarettes. Freebasing is another but less common method of smoking cocaine. Freebase cocaine involves dissolving cocaine hydrochloride in water and an alkaline substance, such as ammonia, and then extracting the cocaine base into ether or another organic substance. Evaporating the organic phase by heating yields a residue that is similar to crack cocaine and can be smoked. The extraction procedure increases the difficulty and hazard (eg, fire) of the conversion process so that crack is considerably more commonly used than freebase. In the following review, smoked cocaine always refers to the use of cocaine base or crack cocaine. Intravenous or intranasal cocaine refers to the use of cocaine hydrochloride.

The rate and extent of cocaine absorption vary considerably across routes of administration and are relevant in the context of abuse liability. Once cocaine is absorbed, however, the pharmacokinetics, regardless of the route of administration, are quite similar. In several studies in

which subjects smoked cocaine base or received cocaine hydrochloride intravenously, there were no differences in the elimination half-lives of the 2 forms.[7,3] One study found a shorter half-life for crack (56 minutes) than intranasal cocaine hydrochloride (78 minutes), but the number of subjects was small.[9] A shorter half-life may be associated with more frequent use, although this difference in half-life will not likely have an impact on the issue of use frequency. Urinary excretion of cocaine and total metabolites was also similar for all 3 routes of administration 64%-69% of the dose) with very little excreted as cocaine (<1%) and most as benzoylecgonine and ecgonine methyl ester.[9] Some minor differences in amounts of metabolites generated may exist as a function of the route of administration, with a modestly lower percentage of benzoylecgonine and a higher percentage of ecgonine methyl ester in urine after smoking compared with administration of cocaine by the other 2 routes.[8] It is unlikely, however, that these differences in metabolism contribute to the effects of cocaine since both benzoylegonine and ecgonine methyl ester appear to have little or no behavioral activity. One notable difference between smoked cocaine and other routes of administration is the production of pyrolysis products during smoking such as methylecgonidine,[10,11] benzoic acid,[12] and methyl-40 (3-pyridine) butyrate.[13] The higher the temperature at which the cocaine is volatilized, the greater the amount of pyrolysis products.[10,12,14] The activity of these products is unknown.

In summary, regardless of whether cocaine is administered as hydrochloride or base, both its rate of elimination and its metabolic profile are similar. It is unclear

whether minor differences in metabolite patterns between routes of administration, or the presence of pyrolysis products in smoked cocaine, contribute to cocaine's behavioral effect.

Is Crack More Addictive Than Cocaine Hydrochloride?

Pharmacokinetics, Pharmacodynamics, and Psychotropic Effects. – Although both humans and nonhumans will take cocaine repeatedly, regardless of the route of delivery.[15] The immediacy and magnitude of cocaine's effect is an important factor in its reinforcing effects and thereby its abuse liability.[16] The magnitude of effect is related to dose as well as to the rapidity with which it reaches the brain. The dose, in turn, is determined by both the actual amount of the drug and its bioavailability. The bioavailability of smoked cocaine is between 60% and 70% when cocaine base is volatilized,[7,9,17] but much of this bioavailability is dependent on the temperature at which the cocaine is volatilized and the skill of the smoker in using the cocaine delivery device. As the temperature increases, less cocaine and more of the pyrolysis products are absorbed (as previously noted). The amount of intranasal cocaine absorbed can vary depending on the dose, with higher doses having greater absorption. For example, a 96-mg dose resulted in 58% of the amount absorbed compared with 30% with a 64-mg dose.[13] However, other studies have found bioavailability of intranasal cocaine as low as 25%[10] and as high as 80% to 94%[7,9] with doses as low as 32 mg.[7]

Since the behavioral activity of cocaine resides primarily in the parent compound, cocaine in any form

produces the same physiological and subjective effects.[4] However, the route of administration plays a major role in the rate of onset as well as intensity and duration of a drug's effect. The more immediate and greater the magnitude of effect, the greater likelihood that the drug will be abused. Orally ingested cocaine achieves maximum concentration most slowly, followed by the intranasal route. Intravenous and smoked cocaine achieve maximal concentration and effect most rapidly. Peak venous plasma cocaine concentration is achieved at approximately 30 to 40 minutes after intranasal administration and at approximately 5 minutes after intravenous and smoked cocaine administration.[7,14,20] Similarly, for intranasal cocaine, the time of peak physiological (eg, heart rate) and subjective effects is later and the duration of effects is longer than with smoked or intravenous cocaine. The maximum physiological effects of intranasal cocaine occur within 15 to 40 minutes and the maximum subjective effects occur within 10 to 20 minutes.[7,14,20-23] Duration of effects is approximately 60 minutes or longer after peak effects.[20,22] The maximum physiological and subjective effects occur within minutes of intravenous or smoked cocaine use, and the duration of effect is approximately 30 to 45 minutes. [7,17,20-23]

One study that directly compared both arterial and venous blood concentrations for intravenous and smoked cocaine showed that for both routes of administration, the peak arterial cocaine concentrations were 10 times higher than venous concentrations, and that maximal arterial concentrations occurred within 15 seconds compared with 3 to 6 minutes with venous concentrations.[24]

Since both routes of administration produce similar pharmacokinetic patterns, the investigators concluded that the abuse liability for these 2 routes of administration could not be differentiated. Thus, both the absorption kinetics and the time course of cocaine effects are strikingly similar for intravenous cocaine hydrochloride and smoked crack cocaine. This finding is surprising given the quickest onset and fastest penetration to the brain is likely to be from inhalation because of the more direct passage to the brain compared with cocaine delivered intravenously.

In the only research study comparing choice of smoked or intravenous cocaine,[25] experienced cocaine users of both intravenous and smoked cocaine chose to take doses of smoked cocaine as frequently as intravenous doses that yielded substantially higher cocaine plasma levels. At doses that yielded similar cocaine plasma levels and similar cardiovascular and subjective effects after single doses (50 mg smoked vs 32 mg intravenously), these research subjects chose to take the smoked over the intravenous cocaine. This choice occurred even though 80% of the participants reported preferences for intravenous over smoked cocaine outside the laboratory. Research subjects described an unwillingness to see their cocaine "go up in smoke" when using drugs they had purchased, while in the laboratory such concerns were irrelevant (M.W.F.). In addition, although initial effects of the smoked and intravenous doses yielding comparable plasma levels were similar, cumulative doses of smoked cocaine increased some subjective effects (eg, "high," "liking") more than did cumulative doses of intravenous cocaine. Another study comparing subjective effects across routes of administration also

found these effects to be greater after smoked cocaine compared with similarly absorbed doses of either intranasal or intravenous cocaine, but even after a single dose.[7] These data confirm the principle that cocaine delivered through inhalation should reach the brain sooner than intravenous cocaine.

In summary, both intravenous cocaine hydrochloride and smoked cocaine base administration are likely to result in a greater potential for abuse than intranasal cocaine because of the greater rapidity and intensity of their effects. Effects tend to be similar between intravenous and smoked cocaine, with possible greater intensity of effect with smoked cocaine. Other factors, such as the ease of administration and cost, may also make smoked cocaine a method of delivery that is more likely to be abused.[7,24,26]

PATTERN OF DRUG USE

Progression From Cocaine Hydrochloride to Crack. – Surveys taken in high schools, treatment centers, and communities show that cocaine smokers typically begin using cocaine hydrochloride via the intranasal route of administration, proceeding to smoked cocaine-base. Kandel and Yamaguchi[27] conducted a survey among 7611 New York State public and private school students in grades 7 through 12. Three times as many cocaine users reported trying crack cocaine after experimenting first with other forms of cocaine as compared with the reverse (44% vs 13%). When sequential models for the progression of drug use were tested, the best-fitting model for males was one in which alcohol use precedes marijuana;

marijuana and cigarette use precede both noncrack and crack cocaine; and noncrack cocaine use precedes crack cocaine, use. For females, the order was essentially the same except that both alcohol and cigarette use precede marijuana use. A similar pattern of progression of drug use was observed in inpatients from a drug treatment program[29] Surveys of individuals who are in treatment, calling a cocaine hotline for help, or in the community setting also show that a significant number of crack cocaine users report having used cocaine hydrochloride prior to crack. For example, approximately 75% to 90% of crack cocaine users reported using intranasal cocaine before smoking cocaine.[29,30] Similarly, in 2 studies conducted with a Veterans Administration Medical Center patient sample, 70% to 80% reported using cocaine intranasally during initial use, and yet about 60% to 70% were smoking cocaine at the time of admission.[31,32] Of note, 1 of the studies found subjects who started using cocaine by the smoking method were least likely to change routes (84% of users who smoked, 64% of intravenous users, and 19% of intranasal users continued to use cocaine by the same route of administration).[32] The most common change of route was from intranasal to smoked cocaine, with 52% of those beginning with the intranasal route switching to smoking. Many other studies have also found this pattern of progression from intranasal to smoked cocaine use.[28,33,34]

Most of these surveys were conducted in the mid to late 1980s, although some were conducted in the 1990s. Since the availability of crack cocaine increased in the mid 1980s, the results of these studies may not be reflective of the most recent patterns of use. For example, a

study conducted in London, England, community settings showed that those who first used cocaine before 1986 were more likely to have initially used cocaine either intranasally or intravenously. However, cocaine users who first tried the drug after 1987 were more likely to have begun by smoking cocaine.[35]

Progression: Experimentation to Dependence. – The route of administration (and the related speed with which the drug reaches the brain) may play a role in the development of compulsive use and dependence including tolerance and withdrawal. Investigators have reported that controlled use commonly shifts to compulsive use. either when access to the drug increases and dosages escalate markedly, or when the user switches to a more rapid route of administration.[36]

In terms of years from first to regular (3 or more times per week) use of cocaine, data collected from street and treatment samples in Miami, Fla, showed more rapid increases in use frequency for crack cocaine compared with intranasal, and intravenous use.[37] This finding is concordant with results from a study of jail inmates that reported that the duration of initial use to regular use (undefined) was significantly shorter for smoked cocaine users vs intranasal and intravenous users.[24] Similar evidence exists for the development of abuse, showing that the smoked or intravenous routes compared with the intranasal route lead to more rapid onset of problems associated with cocaine use or dependence and more rapid entry into treatment.[31,38-10]

Several studies examining routes of administration at the time of treatment showed that a high percentage of

cocaine users entering treatment used smoked cocaine prior to treatment, with rates exceeding 70%.[31,32] Other researchers have also found higher percentages of cocaine smokers comprising the treatment sample compared with other routes of administration.[35,41,42] These findings possibly reflect a greater occurrence of cocaine-associated problems and dependence among crack cocaine users compared with cocaine hydrochloride users.

Most studies show that cocaine smokers and intravenous users often use more cocaine than intranasal users. These observations have been made among treatment- and help-seeking cocaine abusers[32,29,41,42] as well as among a non-treatment sample,[44] in which highest use occurred among those who smoke cocaine. For example, when crack cocaine users interviewed in various settings (treatment, street, jail, or prison) were compared with cocaine hydrochloride snorters, two thirds of crack users smoked on a daily basis, but only 18% of cocaine snorters used cocaine on a daily basis.[45] In an analysis of the 1991 NHSDA, among frequent users compared with infrequent users, there was a greater rate of crack cocaine use (52.5% vs. 17.5%, respectively) as well as intravenous cocaine use (24.3% vs 9.8%, respectively). On the other hand, 1 study examining a treatment sample showed that the intravenous users used larger amounts in short periods of time compared with smokers and intranasal users.[43] In another study that interviewed cocaine users in a community setting in London, intravenous use of cocaine was associated with the highest level of dependence (inability to control the use of cocaine and concern over use of cocaine) and frequency of use, followed by smoked cocaine and then intranasal cocaine.[35] Yet another study

examining a Miami street and treatment sample found the highest total dosage over a 90-day period of time reported among snorters compared with intravenous users and crack cocaine smokers.[27]

With regard to physiological dependence, although no differences in symptoms of withdrawal and tolerance were self-reported by cocaine abusers across routes of administration in 1 study,[32] another study reported that the dysphoria experienced by crack cocaine smokers after using the drug is more intense than that experienced by intranasal cocaine hydrochloride users.[46] This result may be due to differences in the rate of absorption[47] or the amount of cocaine used between smoked cocaine and intransal cocaine.

In summary, these results show that intranasal use of cocaine hydrochloride may be a gateway drug or behavior to crack cocaine use among both white and black populations, although there may have been a change to smoked cocaine as the initial route of administration since the mid 1980s and 1990s. A shift from intranasal to smoked cocaine use is generally accompanied by greater cocaine dependence. The progression to frequent use of cocaine is more rapid when cocaine is smoked. This rapid progression of high-frequency use of smoked cocaine compared with intravenous cocaine is, in part, related to the ease with which a cocaine binge can be accomplished. Repeated intravenous use necessitates specialized paraphernalia and the ability to hit a vein repeatedly while intoxicated. When cocaine is used intranasally, vasal constriction occurs and repeated doses are absorbed less well. Progression to dependence or problems associated with cocaine use is more rapid when it is used by either

the intravenous or smoked routes compared with the intranasal route. These findings suggest that how quickly dependence develops may be more a function of rapid absorption rather than the form of cocaine used. In general, small possible differences in the pattern of use or development of dependence between smoked crack cocaine and intravenous cocaine hydrochloride, even if confirmed, are more than overshadowed by differences in the rate of absorption between both these routes of administration and the intranasal route.

CHARACTERISTICS AND CONSEQUENCES

Regardless of whether the use of cocaine is in the hydrochloride or crack form, cocaine users are heavy users of other illicit and licit drugs.[48] Crack cocaine users in particular are more likely to use a greater variety of other illicit drugs than users of cocaine hydrochloride.[49] This observation has been made even among adolescents.[50] Adolescent crack cocaine users also experience the poorest level of psychosocial adjustment (eg, less closeness with parents, more alienation from peers, greater delinquency, and more psychological problems), poorer grades, and more involvement with drug-using peer groups compared with any other group of drug users, including those students who have used other forms of cocaine.[51] Unfortunately, in both the aforementioned studies, noncrack cocaine was not differentiated by intranasal and intravenous routes, although most adolescents do not inject unless they are already using opiates.

The consequences of cocaine use observed in adolescents from the aforementioned high school survey are strikingly similar to cocaine-related consequences reported by older individuals calling a cocaine hotline or in a cocaine-dependent treatment population. Although intranasal users report consequences of cocaine use that are similar in type to those of smokers and intravenous users, smokers and intravenous users tend to experience greater psychological, interpersonal, financial, and occupational problems and more serious ill effects.[32,39,52] When the amount of cocaine is controlled for, no differences exist across the different routes of administration.[39,58,54] However, both smoking and intravenous use are more likely to involve greater amounts of cocaine use than intranasal cocaine, thereby engendering greater negative consequences.[32,29]

Greater medical illness associated with intravenous and crack cocaine use has been observed in other studies. The Drug Abuse Warning Network (DAWN) gathers information on drug-related emergency room visits and medical examiner cases for selected hospitals and medical examiners in several metropolitan areas. The 1992 DAWN report indicated that 37% of cocaine-related emergency room admissions involved cocaine smoking, 18% involved cocaine injection, and 11% involved cocaine snorting (the route of administration of cocaine was "other" for 4% and unknown for 30% of cases).[65] Similarly, another retrospective study showed a higher percentage of crack cocaine smokers required hospital admission compared with users of cocaine hydrochloride.[56] They also noted more psychotic symptoms and thoughts or acts of violence occurring in this crack

cocaine group. The emergence of crack cocaine smoking in the mid 1980s was considered by the authors of these reports to be possibly one of the factors associated with the increase in the number of emergency department visits related to cocaine. Of note, however, is the high rate of these visits for intravenous use given the lower base rate of use via this route. In another study, among cocaine users seen in the medical emergency department during 1986 and 1987, the single most common route of use was intravenous.[57] In the 1992 DAWN report,[58] the most frequent route of administration associated with cocaine-related deaths was intravenous (the route of administration for cocaine was unknown for 73% of the cases). Similarly, in a study conducted between 1988 and 1990 examining a Miami street and treatment sample, intravenous cocaine hydrochloride use led to the greatest number of self-reported overdoses, followed by intranasal and crack cocaine users. The unexpectedly high number of overdoses reported by intranasal cocaine users can be attributed to the higher cocaine dosages reported to be used among this group compared with crack users.[37] Greater toxicity from the intranasal route in this population may have been due to difficulty with titration of the dose because of the longer time between drug use and drug effect and the greater ability to control the total dose of smoked cocaine on a puff-by-puff basis compared with other routes of administration. Because Miami is the gateway to cocaine distribution in the United States, the cocaine tends to be cheaper, more readily available, and more pure, increasing the ease of acquiring it and/or the likelihood of adverse consequences.

A greater number of smoked cocaine users also suffer from certain psychiatric disorders compared with intranasal or intravenous users. In a sample of cocaine abusers seeking inpatient and outpatient treatment, those who preferred the smoking route had the highest rates of intermittent depressive personality disorder compared with other routes of administration, but the lowest rates of alcoholism and antisocial personality disorder as determined using the Schedule for Affective Disorders and Research Diagnostic Criteria.[59] Concordant with the results showing a higher rate of depression, the rate of suicide attempts among crack cocaine abusers was 2 to 4 times greater than that of abusers of other primary drugs of abuse, as reported in a study examining substance abusers entering therapeutic communities.[60] Similar trends were observed in the number of psychiatric hospitalizations across routes of administration, with the highest number among crack users compared with noncrack cocaine users (intravenous and intranasal users were not differentiated).[60] In addition, in a study of 40 cocaine-dependent subjects admitted to a metropolitan psychiatric inpatient ward for psychiatric symptoms, 88% were crack cocaine users.[61]

Sexually transmitted disease is another area in which increased rates are observed in cocaine smokers compared with those who use cocaine by other routes of administration. In a 1991 survey of drug users, crack cocaine smokers (whether or not they were also injection users) reported more sex partners, more acts of unprotected sex, a higher frequency of exchanging sex for drugs and/or money, and a higher frequency of drug use before or during sex than intravenous cocaine users who

did not smoke cocaine.[62] The high prevalence of these sexual behaviors promoting the risk for human immunodeficiency virus (HIV) infection was also found in a study examining crack users from 3 inner-city communities.[63] In fact, crack cocaine smokers have been found to have rates of HIV infection as high as those among intravenous drug users.[64] Crack cocaine users were also more likely to contract other sexually transmitted diseases, such as gonorrhea, and syphilis, compared with cocaine hydrochloride users.[62,64]

Fetal cocaine exposure increases both neonatal hospital costs and lengths of stay, resulting from in utero development problems including small head circumference, low birth weight, and urogenital abnormalities.[66,67] Increases in hospital costs and length of stay are greater when mothers specifically admitted to using crack cocaine compared with other forms of cocaine ($6735 vs $1226 and 7.9 vs 2.9 days, respectively), even when controlling for the effects of prenatal care, maternal alcohol and cigarette use, race, gravidity, maternal age, and sex of the infant.[66] The areas of effects of cocaine on neonates remains controversial. Other studies have found limited effects of cocaine on neonates. However, these negative results may be due to lower levels of cocaine use and differences in duration of exposure or other factors including nutritional status.[68,69]

Violence and crime associated with cocaine are considered to be in large part related to either the system of drug distribution (systemic crime)[70,71] and/or economically or financially driven due to drug consumption,[72] rather than being pharmacologically driven. In fact, violence directly induced by the pharmacological effects of

cocaine hydrochloride or crack is considered uncommon.[71,72] Systemic crime associated with the crack cocaine market has been attributed to a number of social and cultural factors. These include the following: (1) the social and economic deterioration and destabilization in the neighborhoods where crack selling is concentrated; (2 the consequent lack of social control that limits crime, drug use, and drug selling; (3) the lack of economic and social resources to counteract the underground economy; (4) the immaturity and volatility of the crack market; (5) the competitiveness that occurred when new drug distribution groups were developed with the introduction of crack cocaine; and (6) the increased availability of more powerful guns.[70,72,73] Furthermore, those involved in the distribution of crack cocaine are younger than those distributing cocaine hydrochloride.[70] In part, the harsher penalties for crack cocaine may be one of the reasons for the rise in juvenile violence. Penalties for crack have driven drug dealers to recruit juveniles as drug sellers because of the less severe sentencing for juveniles when arrested.[4] These juveniles often carry weapons, leading to a situation in which armed impulsive adolescents are involved in drug dealing.

Possibly because of the convergence of all these factors, crack cocaine sellers are more often involved in drug-related crimes than sellers of other drugs, including cocaine hydrochloride.[4,70,71,73] For example, 1 study examining crack cocaine and other drug users/sellers who were arrestees, residents, and participants in residential drug treatment programs in Manhattan[70] found that approximately 40% to 50% of those selling crack cocaine, cocaine hydrochloride, and heroin or marijuana

are involved in various types of violent incidents compared with about 20% of those selling cocaine hydrochloride, heroin, and marijuana. On the other hand, involvement with nonviolent crimes was highest among those selling cocaine product, with no differences in rates between crack cocaine and cocaine hydrochloride dealers. In another study of arrestees from the New York City Police Department,[73] crack cocaine offenders were less likely to have previous arrests for drug and nondrug crimes and prior jail or prison sentences compared with cocaine hydrochloride offenders. Although both cocaine hydrochloride and crack offenders experienced increased arrest between 2 years prior to and 2 years after the sample arrest, the crack offenders had a significantly greater increase in arrest rates for most crimes, including non-drug felonies and violent crimes, suggesting an acceleration of arrests with initiation into distribution of, or other involvements associated with, crack cocaine. This pattern was observed even when examining only arrestees whose sample arrest was a first offense. This finding may have been associated with greater enforcement efforts against crack during the period of the study. In data prepared by the US Sentencing Commission, crack cocaine offenders, who have been sentenced in federal courts and charged with cocaine distribution, were observed to be more likely to carry weapons than individuals trafficking in other drugs including cocaine hydrochloride (27.9% crack cocaine offenders vs 15.1% cocaine hydrochloride offenders) and more likely to have had extensive criminal records for the highest levels of criminal history categories (17.6% crack cocaine vs 7.0% cocaine hydrochloride).[4]

Economically driven crime is primarily committed by offenders who are crack cocaine users selling the drug to support their own consumption.[46,72,74,75] For example, of those arrested by the Detroit (Mich) Police Department for the retail distribution of cocaine, most were users of crack (60%) who sold the drug in order to fund personal use. Only 25% of the population sought cash and not drugs as a reward.[74] Among the federal offenders convicted of possessing more than the statutory minimum amount of cocaine and considered to be distributors, a similar percentage of individuals (64%) were identified as having a substance abuse problem or addiction.[4] In another study, cocaine users and dealers were interviewed between 1988 and 1989 from various settings (treatment, street, jail, or prison) in New York City.[45] When crack cocaine users were compared with cocaine snorters and other drug users, crack users were found to be using drugs at higher rates, as well as receiving higher incomes from drug sales and non-drug-related crimes. In addition, a higher percentage of cocaine smokers committed robbery, burglary, thefts, petty larceny, sale of stolen goods, simple assault, and prostitution compared with cocaine snorters. The positive relationship between the amount of cocaine use and the number of crimes committed has been observed in another study.[75] Thus, many individual cocaine dealers are users who may deal to maintain access to the drug or to obtain money to purchase cocaine.[4] Of note, studies also show that crack dealers tended to engage in deviant behavior even prior to the use and sale of crack cocaine.[70,73] This suggests that the higher rate of crime in crack users and sellers may be due to recruitment of already deviant individuals, and

involvement with cocaine may only facilitate or intensify existing criminal behaviors.[72] Therefore, concluding that crack distribution, selling, and use leads to violent or criminal behaviors or that violence only occurs in association with drugs may not be entirely accurate.[78]

In summary, the acute and chronic use of cocaine, regardless of the route of administration, results in similar psychological, social, and medical sequelae (although specific routes of administration have specific medical manifestations). However, because of the greater frequency and amount of use among both crack cocaine users and intravenous cocaine hydrochloride users, the negative consequences among these 2 groups may also be more frequent and severe than among those who use cocaine intranasally. Differences may also exist between cocaine smokers and intravenous users. For example, compared with intravenous cocaine users, cocaine smokers engage in greater sexual activity, experience a higher rate of contracting sexually transmitted disease, and greater neonatal costs, and may experience depressive mood and other psychiatric problems at a higher rate. In addition, crime, including violence, has been more frequently associated with crack cocaine than cocaine hydrochloride. However, whether this finding is a function of the cultural context in which crack distribution and use emerged, is inherent to the method of cocaine delivery (ie, greater potential for abuse), or both, is unclear. In addition, the greater number of psychiatric problems and hospitalizations experienced by crack cocaine users may have an impact on the crime and

violence occurring with this group. Unfortunately, several limitations exist in some of the current studies making it difficult to come to any specific or clear-cut conclusions. For example, most studies do not differentiate between intravenous and intranasal cocaine hydrochloride use, so that distinctions in consequences between intravenous and smoked cocaine are difficult to assess. Furthermore, polydrug use, use of multiple routes in the same participants, and after-the-fact analysis make careful interpretation of the data difficult.

COMMENT

Differences Between Crack and Cocaine Hydrochloride

It is very clear that both smoked crack cocaine and intravenously administered cocaine hydrochloride have greater abuse liability, greater propensity to produce more substantial dependence, and lead to more severe social and personal consequences than cocaine hydrochloride that is administered intranasally. Crack cocaine is a cheaper (by the individual dose) and more readily and easily administered form of cocaine than intravenously administered cocaine hydrochloride, and therefore fewer individuals are inclined to use intravenous cocaine hydrochloride. Fear of HIV seroconversion has added to this disinclination, although in reality the use of crack cocaine has led to rates of HIV infection similar to intravenous drug use because of the increased rate of sexual activity associated with crack use. However, these differences may not warrant a dramatically unbalanced punishment for the possession of crack cocaine vs cocaine hydrochloride. Several other factors must be taken into

account. First, cocaine hydrochloride can be readily converted to the smokable form, which occurs most often on the wholesale and retail levels of the distribution chain. Second, the behavioral effects are a result of the parent compound regardless of the form in which the cocaine was ingested or the route of administration. Third, the rapidity and magnitude of effect determines the abuse liability of the drug and development of dependence, rather than the form in which it was ingested, although the ease of administration and availability of the drug will also play a role in the abuse liability of a drug. Fourth, many who progressed to crack cocaine use began with intranasal cocaine hydrochloride. Therefore, controlling the use of cocaine hydrochloride may be important. Fifth, the final pathway for heavy use of either cocaine hydrochloride or crack cocaine is the same. Both forms of cocaine can lead to a lack of control over use and the same psychological, social, legal, and physiological consequences. However, crack cocaine users, as well as intravenous cocaine hydrochloride users in some instances, tend to experience more severe consequences and more rapid development of problems due to the amount and frequency of use, not because of the form of cocaine. Therefore, the issue is not the differences between crack cocaine and cocaine hydrochloride because they are essentially the same drug and can cause the same effects and consequences. The primary issues are the speed and intensity of delivery of the drug, the accessibility and cost of the unit price of the drug, and the cultural environment and social context in which the drug is used.

Based on these findings, the current federal sentencing guideline that markedly differentiates the penalties

for crack cocaine and cocaine hydrochloride is not warranted. This conclusion concurs with similar recommendations made in 1995 by the US Sentencing Commission. Furthermore, these findings also concur with the US Sentencing Commission proposal for a reduction rather than elimination of the differential ratio for sentencing of crack cocaine offenders, since it is notable that crack cocaine compared with cocaine hydrochloride is easier to use and more accessible to a broader population, leads to more rapid increases in use, and is associated with more harm in some areas, such as crime. It is difficult, however, to determine what the actual sentencing ratio should be or the criteria on which to base this ratio. If this ratio is based on abuse liability, then the data on which to determine the ratio still remains problematic. A possibility, although not the optimal method, would be to compare the percentage of past-month users among those who ever used cocaine or crack. With this method, and using the 1994 NHSDA, the ratio would be 2 to 3:1 (11.1% reporting ever using crack cocaine compared with 4.5% of those reporting ever using noncrack cocaine are past-month users) rather than 100:1. Other factors to be considered might include social context, current availability, and associated deleterious consequences, all of which contribute in various degrees to a somewhat more severe penalty for crack cocaine-related convictions. Limited research in these areas precludes any definite ratio to be established at this time. Clearly, more systematic research needs to be conducted to specifically deal with these issues.

Implications for Policy

The federal sentencing guideline places a significant emphasis on penalizing sellers and/or possessors of crack cocaine, many of whom are also users of cocaine and addicted to it, so that much of the selling (crack cocaine or cocaine hydrochloride) and cocaine-related crime are driven by the addiction. Therefore, there are 2 issues to be considered in evaluating the rationale for treating the sale or possession of crack cocaine vs cocaine hydrochloride differently. One is the question that has been directly addressed here: are crack cocaine and cocaine hydrochloride different, and if so, in what ways? A second question is whether it is cost-effective to imprison addicts selling or possessing crack cocaine and addicted to it.

Drug addiction of the convicted seller or possessor of any form of cocaine should be a mitigating factor in the way sentencing is carried out, much as other psychiatric disorders currently influence sentencing. The report from the US Sentencing Commission stated that the unique approach to emphasizing severe punishment of those who possess crack for personal consumption is at odds with the prevailing treatment-oriented approach prescribed by Congress for other drug users and/or possessors. Prison is a scarce commodity in the United States, and if treatment has the potential to decrease the likelihood that the individual treated will return to selling cocaine, it makes sense to try that approach first. In fact, drug abuse treatment has been shown to work about as well when mandated by the courts or under conditions in which users have the option to go into treatment or go to jail as when it is voluntary.[76] Furthermore, crack

cocaine has been targeted on the most vulnerable population, one that does not have extensive resources available to them. Unfortunately for the typical inner-city crack user, drug use has become, or at least appears to be, normative, and with limited available resources, the benefits of quitting may not outweigh the powerfully reinforcing effects of cocaine.

Increasing the availability of personal and social reinforcers has been found to increase treatment success among cocaine users,[77] and the development of community resources and involvement has been recommended to reduce the demand for drugs.[73] Research using modeling has demonstrated that greater efforts at interdiction and enforcement will not have significant effects on the nation's cocaine problems,[78,79] primarily because of the adaptability of the distribution of cocaine, whether on our borders or on our streets. In addition, by imprisonment of these individuals, society is choosing the most expensive option to deal with a problem that, for some, can be managed more effectively by intensive outpatient therapy combined with meaningful supervision from the criminal justice system. The treatment of heavy users of cocaine has been found to be far more cost-effective than supply control programs that include source-country control, interdiction, and domestic enforcement.[80] Current studies clearly indicate that treatment is effective in promoting abstinence from cocaine as well as reducing the amount of cocaine use.[81] Although no specific pharmacological agent has been found to be effective in the treatment of cocaine abuse and dependence,[82] various psychotherapeutic and behavioral interventions have demonstrated significant treatment outcome effects.[83-85]

Despite these findings, the estimated federal drug control spending for 1995 is budgeted at 65% for interdiction efforts compared with 35% for controlling cocaine demand. There is no doubt that efforts to reduce supply must continue. However, instead of using the differences between crack cocaine and cocaine hydrochloride to justify enormous differences in prison sentences for those convicted of selling cocaine, focusing on approaches that could lead to better treatment and prevention is a more constructive and ultimately more cost-effective approach to this issue.

The fact does remain that not all of those convicted of selling cocaine or engaging in cocaine-related crime are in need of drug abuse treatment nor are all of those convicted appropriate for treatment. At least 25% or more of those convicted are not selling or committing crimes to support their own cocaine use, and many others do not respond to treatment. For them, a prison sentence appears to be the only current option. Furthermore, addiction to cocaine does not preclude total avoidance of a jail sentence. However, unlike the current federal sentencing guidelines for possession of crack cocaine, the minimum statutory sentence should reflect the comparability of these 2 forms of cocaine, perhaps with a 2 to 3:1 (crack cocaine to cocaine hydrochloride) ratio.

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APPENDIX F
Journal of the American Medical Association

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JAMA Letters - February 12, 1997

Crack vs Inhaled Cocaine and Sentencing

To the Editor. – Drs Hatsukami and Fischman [1] wrote a most interesting article. Their conclusion, however, is to be debated. They state that "those addicted individuals who are incarcerated for the sale or possession of cocaine are better served by treatment than prison." This is very likely true, but society is better served by getting these individuals out of a circumstance in which they might continue to sell these drugs. Society and the individuals would best be served by having the addicted individuals treated in prison.

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New York, NY

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1. Hatsukami DK. Fischman MW. Crack cocaine and cocaine hydrochloride: are the differences myth or reality? JAMA. 1996;276:1580-1588.

(JAMA. 1997;277:457)

To the Editor. – Differences between crack cocaine and cocaine hydrochloride were accepted until the discovery that blacks were disproportionately convicted for possession of crack (a form of cocaine hydrochloride). This led to charges that the law was discriminatory [1] and that the disparity

between the weight of cocaine hydrochloride and the weight of crack needed to trigger mandatory sentences was based on "mythical" differences. The review by Hatsukami and Fischman [1] addresses this issue.

That crack and cocaine hydrochloride are ultimately the same substance is irrelevant. Lead can be found in bullets or in printer's type. The intent of the user not the chemical composition of the material is the relevant information for the legal system.

The weight of material held by the person accused of possession serves only as a metaphor for intent. A greater weight implies an intent to distribute. A smaller amount implies that the drug is for personal use. There is face validity to the idea that the law should treat dealers and users differently. These are appropriate uses for the weight of a single illegal substance to be considered in sentencing.

Setting a ratio of weights across different substances is problematic. Should the possession of crack be treated the same as possession of cocaine hydrochloride or more severely, considering that crack is more dangerous?[3] Should there be a ratio? This ratio could be based on a measure of "dangerousness," a soft concept. A ratio based on soft numbers is an arbitrary guess.

There is no scientific method for calculating this ratio. When asked what the ratio should be, neither Dr. Charles R. Schuster (former director of National Institute on Drug Abuse) nor I could give a specific number to the US Sentencing Commission.[3] There is no correct

number:neither 100;1, as the present law holds, nor 2:1 to 3:1, as the authors suggest.[2]

I am told that the present ratio is based in part on my testimony to the US Senate in 1986.[4] If so, it is the result of a transposition of numbers that resulted in a questionable law. A query that mentioned a "fifty times greater risk of addiction" claimed by "some experts" in comparing cocaine hydrochloride with crack seems to be the starting point for that ratio.

Our drug laws and punishments are not scientifically determined. We do not even declare drugs to be illicit on the basis of scientific evidence. If we did, the corner tobacconist would long since have been jailed for selling a known carcinogen. Setting penalties on the basis of scientific evidence would require studies on the efficacy of varying punishments in reducing use or trade in drugs. Draconian drug laws have not been effective in stopping the drug trade. Decisions based on medical information may not be possible.

The calculus of sentencing belongs to the legislators. We can, as the authors have, describe consequences of drug use and advocate the desirability of treatment. We should not concoct ratios when we cannot provide a scientific basis for them. If we are to be helpful, we should stay within our limits.

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2. Hatsukami DK, Fischman MW. Crack cocaine and cocaine hydrochloride: are the differences myth or reality? JAMA. 1996;276:1580-1588.

3. US Sentencing Commission. Cocaine and Federal Sentencing Policy. Washington, DC: US Sentencing Commission; February 1995.

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(JAMA. 1997;277:457)

To the Editor. – The review presented by Drs Hatsukami and Fischman[1] fails to address 1 important reason that federal law governing the possession of crack cocaine is disproportionately strict compared to that governing cocaine hydrochloride: the lay media.

A review of 318 articles from 11 major magazines (eg, Time, Newsweek, US News) from 1975 to 1990[2] illustrates that the media was often inaccurate in describing the effects of cocaine and the consequences of its use. These magazines tended to concentrate on events concerning specific celebrities, the prevalence of cocaine use in the inner city, and its association with crime at a time when use had peaked and was beginning a 7-year

decline. Undoubtedly, the sense of panic fostered by the media contributed to the development of sentencing guidelines during 1986 and 1988.

Reporting volume tells part of the story: fewer than 5 articles about cocaine were published in 1978. By 1981 and 1982 interest had begun to rise in a gradual ascent to more than 160 articles per year. The number of cocaine-related articles declined in 1987 and 1988 and then peaked again in 1989, but with a greater emphasis on crack cocaine. Since that time the media has gradually lost interest in cocaine reporting.

Thematic analysis also helps to explain the development of strict federal sentencing guideline in the late 1980s. Between 1975 and 1982 cocaine was depicted as being used by intellectuals and the upper classes. It was assumed to be a relatively innocuous, nonaddicting substance. The only risks described were legal ones – if the user were caught.

Between 1982 and 1985 cocaine started to be used by middle-class Americans. reporting started to emphasize lost productivity, cost to the workplace, and difficulties of kicking a cocaine "habit." Most articles questioned whether cocaine was addicting.

1986 was the peak year in cocaine reporting, the year Len Bias, a well-regarded basketball player, died of complications from cocaine use, as well as the year crack cocaine reportedly moved to the inner city. Subsequently, crack use became regarded as a national crisis. Crack was portrayed as an altogether different drug than cocaine hydrochloride, far more likely to be associated with crime

and addiction, and a drug that affected "innocent victims," such as crack babies.

Reporting between 1987 and 1990 was marked by the themes of inner-city crime, drug wars, innocent victims, and the corruption of youth. Crack continued to be portrayed as instantly addicting and extremely dangerous.

Continuing a history characterized by mythology and metamorphosis,[3] cocaine's image underwent another major transformation between 1975 and 1990. Based on fears about disintegrating inner cities and the deaths of celebrities, the media painted a picture of inevitable destruction associated with all cocaine use, particularly with crack use.

Crack cocaine does differ from cocaine hydrochloride in its distribution patterns, marketing, and some of its physiologic effects, but the development of federal laws that punish possessors of crack more severely than those using cocaine hydrochloride clearly reflected social values, as evidenced by media reporting.

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1. Hatsukami DK, Fischman MW. Crack cocaine and cocaine hydrochloride: are the differences myth or reality? JAMA 1996;276:1580-1588.

APPENDIX G
Editorials

Copyright 1997 The New York Times Company
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February 6, 1997, Thursday, Late Edition – Final

SECTION: Section A; Page 24; Column 2; Editorial Desk

LENGTH: 220 words

HEADLINE: Topics of The Times;
Unfair Sentencing

BODY:

A provocative report in the Journal of the American Medical Association has underscored the absurdity of a Federal sentencing policy that penalizes the sale or possession of ***crack*** cocaine, which is popular in poor black neighborhoods, far more severely than the sale or possession of powdered cocaine, popular among whites.

Present guidelines impose the same five-year minimum sentence for possession of 5 grams of ***crack*** or 500 grams of ***powder.*** This 100-to-1 sentencing disparity, and its lopsided racial impact, cannot be justified, even by ***crack's*** greater association with violent street crime.

The novelty of the Medical Journal's article is that it challenges the Federal sentencing law on medical grounds. Based on their analysis of studies on cocaine going back 20 years, two psychologists specializing in drug addiction, Dorothy Hatsukami at the University of Minnesota and Marian Fischman at Columbia University, conclude that the physiological and psychoactive effects of the two forms of cocaine are sufficiently similar to render the sentencing disparities excessive. They propose

reducing the disparity sharply, from 100-to-1 to roughly 2-to-1.

Two years ago, Congress rejected a recommendation to eliminate the disparity almost entirely. The medical evidence should prompt renewed debate.

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January 06, 1997, Monday, Final Edition

SECTION: A SECTION; Pg. A02; SCIENCE NOTEBOOK

LENGTH: 215 words

HEADLINE: Biology: Similarities Between Nicotine, *Cocaine*

BYLINE: Rob Stein

BODY:

Nicotine appears to stimulate brain cells in nearly the same way that *cocaine* does, new research finds.

Previous studies have shown that nicotine and *cocaine* both tend to activate the same parts of the brain – parts that use the neurotransmitter dopamine and are involved in pleasure.

In the new research, scientists at the drug company Glaxo-Wellcome in Geneva studied laboratory rats that received *cocaine* and nicotine for two weeks. By measuring proteins produced by genes activated in parts of the brain, the researchers found that the two drugs appear to stimulate those areas in nearly identical patterns.

"In humans, nicotine and *cocaine* are compulsively self-administered by cigarette smokers and *cocaine* users," the researchers wrote in the Jan. 3 Science. "In the rat model, compulsive self-administration of nicotine and *cocaine* was associated with overlapping activation maps in [nearly every section of the brain studied], corroborating the view that there is a common neuronal substrate for addiction of these two drugs."

Neal Benowitz, a nicotine researcher at the University of California at San Francisco, said the research adds a new level of support for the idea that while nicotine and ***cocaine*** have different effects, they are very similar drugs.